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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE, Petitioners

v.

THE SUQUAMISH INDIAN TRIBE, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Philip P. Malone
Counsel for Petitioners

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SUPREME COURT OF THE UNITED STATES

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NO. _____

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE, Petitioners

v.

THE SUQUAMISH INDIAN TRIBE, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review:

1. The judgment of the United States Court of Appeals for the Ninth Circuit, entered in the case of Mark David Oliphant v. The Suquamish Indian Tribe, et al. 9 Cir., 1976, Cause No. 74-2154.[1/]

2. Before judgment of the United States Court of Appeals for the Ninth Circuit in the case of Daniel B. Belgarde v. The Suquamish Indian Tribe, et al. 9 Cir., Cause No. 75-3319.[2/]

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[1]Additional Respondents in the case of Mark David Oliphant v. The Suquamish Indian Tribe, et al., 9 Cir., 1976, Cause No. 74-2154, are: EDWARD SCHLIE, Chief of Police of the City of Bremerton; RICHARD BELMONT, JR., Chairman of Council of Suquamish Indian Tribe; DONALD BREAD, Suquamish Tribal Manager; FRED GUARDIPEE, Suquamish Tribal Police Officer; GRACE DUGGAN, Suquamish Tribal Judge; CECILIA HAWK, Suquamish Tribal Judge; and GEORGE M. FELSHAW, Superintendent of the Western Washington Tribal Agency.

[2]Additional Respondents in the case of Daniel B. Belgarde v. The Suquamish Indian Tribe, et al., 9 Cir., Cause No. 75-3319, are: ROGERS C. B. MORTON, Secretary of the Interior of the United States; CECELIA M. HAWK, Judge, Suquamish Tribal Court; and GRACE DUGGAN, Judge, Suquamish Tribal Court. Party Respondents in the Belgarde case differed only from the Oliphant case in that the Belgarde case included ROGERS C. B. MORTON, Secretary of the Interior of the United States, and did not include EDWARD SCHLIE, Chief of Police of the City of Bremerton; RICHARD BELMONT, JR., Chairman of Council of Suquamish Indian Tribe; DONALD BREAD, Suquamish Tribal Manager; FRED GUARDIPEE, Suquamish Tribal Police Officer and GEORGE M. FELSHAW, Superintendent of the Western Washington Tribal Agency.

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CITATIONS TO OPINIONS BELOW

Oliphant v. Suquamish Indian Tribe et al., 9 Cir., 1976, Cause No. 74-2154. The memorandum opinion of the United States District Court, Western District of Washington, filed April 5, 1974, typed in Appendix "A" hereto, infra, p. 1-7, is unreported. The opinion of the United States Court of Appeals for the Ninth Circuit, typed in Appendix "A" hereto, infra, p. 8-33, is unreported.

Belgarde v. Suquamish Indian Tribe et al., 9 Cir., Cause No. 75-3319. Report and Recommendation of the United States Magistrate, United States District Court, Western District of Washington at Seattle, dated the 1st day of August, 1975, Case No. C-74-683S, typed in Appendix "A" hereto, infra, p. 34-49, is unreported. The order denying Writ of Habeas Corpus by the United States District Court, Western District of Washington at Seattle, dated August 18, 1975, Cause No. C-74-683S, typed in Appendix "A" hereto, infra, p. 50-51, is unreported.

JURISDICTION

Oliphant v. Suquamish Indian Tribe et al., 9 Cir., 1976, Cause No. 74-2154. The judgment of the United States Court of Appeals, Ninth Circuit, was entered on August 24, 1976. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

Belgarde v. Suquamish Indian Tribe et al., 9 Cir., Cause No. 75-3319. Judgment of the United States District Court, Western District of Washington at Seattle, Case No. C-74-683S, was entered on August 22, 1975, R.24. Before judgment of the United States Court of Appeals for the Ninth Circuit, the jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

Before judgment of the United States Court of Appeals for the

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Ninth Circuit, the case of Belgarde v. Suquamish Indian Tribe et al. 9 Cir., Cause No. 75-3319, is joined in a petition for Writ of Certiorari with Oliphant v. Suquamish Indian Tribe et al., 9 Cir., 1976, Cause No. 74-2154 after judgment by the United States Court of Appeals for the Ninth Circuit, pursuant to Rule 23, Section 5. of this Court, in that each case involves identical or closely related questions and pursuant to Rule 20 of this Court in that the case of Belgarde v. Suquamish Indian Tribe et al., 9 Cir., Cause No. 75-3319 is of imperative public importance as to justify the deviation from normal appellate process and to require immediate settlement in this court upon the following showing:

1. The opinion of the United States Court of Appeals for the Ninth Circuit in Oliphant v. Suquamish Indian Tribe et al., 9 Cir., 1976, Cause No. 74-2154, Appendix "A", infra P. 8-33, makes no distinction in holding that the Suquamish Indian Tribe has criminal jurisdiction for offenses by non-Indians occurring on non-Indian public highways of the State of Washington, occurring within the boundaries of the Port Madison Indian Reservation, (Belgarde v. Suquamish Indian Tribe et al., 9 Cir., Cause No. 75-3319 supra), as from criminal offenses by non-Indians occurring on tribal lands within the Port Madison Indian Reservation (Oliphant v. Suquamish Indian Tribe et al., 9 Cir., 1976, Cause No. 74-2154 supra), and therefore establishes a legal precedence for the sovereign authority and jurisdiction of an Indian Tribe to pass laws, enforce those laws by its police power and adjudicate cases in its tribal court for violation of any of its laws by non-Indians occurring on Indian or non-Indian land within the boundaries of an Indian Reservation.

2. The case of an Indian Tribe having general criminal jurisdiction over a non-Indian who commits crimes within the boundaries

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of an Indian Reservation, has been unsolved by the courts of the United States for almost 100 years (Oliphant v. Suquamish Indian Tribe et al., 9 Cir., 1976, Cause No. 74-2154, Opinion, Appendix "A", infra, page 8. During that period of time the United States has pursued a policy of termination of tribal ownership of lands by treaty as well as legislation whereby on many reservations, lands are owned by non-Indians in fee simple title derived from title held in patent by the United States after allotment made to individual Indians, and transferred by individual Indians to non-Indians.[3/] As a result, the status of the holding of the United States Court of Appeals, Ninth Circuit in Oliphant v. Suquamish Indian Tribe et al., 9 Cir., 1976, Cause No. 74-2154, results in sovereign jurisdiction and authority of an Indian tribe on Indian reservations over criminal offenses of non-Indians where the majority of the population and the land is non-Indian within the boundaries of those reservations, causing conflict in the laws, causing conflict in the application and enforcement of criminal laws and state and local governments as from laws of the Indian tribe in the application to non-Indians.

QUESTIONS PRESENTED

1. Whether non-Indians while on the Port Madison Indian Reservation in the state of Washington are subject to criminal laws promulgated, enforced and adjudicated by the Suquamish Indian Tribe of that reservation through its tribal council, police and court, for alleged offenses of those laws by non-Indians occurring within the boundaries of the reservation, when jurisdiction of the tribe is exercised by it as an original inherent power of itself as an independent sovereign nation acting territorially within the boundaries of the reservation and without expressed authority of

3/ General Allotment Act, February 8, 1887, 25 USC §331, et al.

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the Constitution of the United States, the Treaty of the United States with that tribe establishing the reservation, the laws of the United States or the State of Washington.

2. Whether when the United States, having plenary power and power by law over crimes on an Indian reservation for offenses occurring between non-Indians and Indians, excluding the jurisdiction of the state wherein the reservation is located, prohibits the tribe by expression or implication from exercising such jurisdiction concurrently with the United States over those offenses occurring within the reservation under the laws of the United States and the United States Constitution.

3. Whether such sovereign criminal power and jurisdiction that the Suquamish Indian Tribe may have had over criminal offenses by or against non-Indians in the state of Washington terminated by the laws of cession of that power by the United States to the state of Washington, coupled with the acceptance by the laws of the state of Washington of that power and the petition and consent of the tribe to such cession and acceptance of jurisdiction prior to the exercise of such power by the tribe.

4. Whether, if such criminal power and jurisdiction the Suquamish Indian Tribe may have had over criminal offenses by non-Indians had terminated as provided in Question 3. hereof, such termination was rescinded upon a subsequent proclamation by the Governor of the state of Washington providing for retrocession of the criminal jurisdiction of the state of Washington to the United States with limitations therein by reference to the laws of the state of Washington, and the acceptance of retrocession by the Secretary of Interior of the United States, limiting such acceptance to those laws as provided in the Governor's proclamation.

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CONSTITUTIONAL PROVISIONS, TREATIES,
STATUTES, ORDINANCES, OR
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are as follows and are typed in Appendix "B" hereto, infra, P. 1 to 70, thereof, filed separate from this Petition.

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STATEMENT OF CASE

1. Oliphant vs. Suquamish Indian Tribe et al, Cause No. 74-2154.

The petitioner herein, MARK DAVID OLIPHANT, a non-Indian residing on the Port Madison Indian Reservation in Kitsap County, Washington, filed a Petition for a Writ of Habeas Corpus in the United States District Court, Western District of Washington at Seattle on August 23, 1973, alleging that on August 19, 1973, he was imprisoned and restrained of his liberty in the jail of the City of Bremerton, Washington as a result of an unlawful arrest of his person as a non-Indian by officers of the Suquamish Indian Tribe and committed to jail by an Order of the Suquamish Indian Court, until bond was posted for an appearance for trial in the Suquamish Indian Court for violation of a law of the Suquamish Indian Tribe of assault and battery and resisting arrest by the Tribal officers of the Suquamish Indian Tribe. On August 23, 1973, the United States District Court ordered the Chief of Police of Bremerton to appear and show cause in answer to the petition. On August 24, 1973, petitioner was released from the jail of the City of Bremerton, on his personal recognizance to appear for trial before the Suquamish Tribal Court on the charges stated. A return to the Order of Show Cause of the Federal District Court was made by the respondent, the Chief of Police of the City of Bremerton, setting forth an agreement made June 7, 1973 between the City of Bremerton and the Bureau of Indian Affairs for the care and custody of "Indian prisoners" upon written orders of the Suquamish and Port Gamble Tribal Courts and its officers.

On September 11, 1973, the petitioner filed a "Supplement to Petition for Writ of Habeas Corpus" and an order granting leave to file the supplement was granted by the Federal District Court on

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September 11, 1973. The supplement named additional parties respondents (supra Footnote 2), and invoked the jurisdiction of the Federal District Court to test the legality of the arrest, restraint and detention by the respondents, in accordance with:

1. Constitution of the United States, Article 1, §9. Limitations upon powers of Congress, Section 9, Clause 2. (Privilege of the Writ of Habeas Corpus), Appendix "B", infra, page 1, 1(b).

2. PUBLIC LAW 90-284 (1968 - 82 Stat. 78), 25 USC §1303 Habeas Corpus, Appendix "B", infra, page 22, 5(a).

3. 28 USC §2241 (a); (c), (1) and (3), HABEAS CORPUS Powers to Grant Writ, Appendix "B", infra, page 23.

On September 25, 1973, the United States District Court issued an order directed to the respondents to show cause on November 2, 1973 as to the granting of the Petition and Supplement for Writ of Habeas Corpus. Subsequent order extended the return date to January 25, 1974, and further requested memorandum of authorities setting forth in particular:

1. Description of the various Indian lands, both Trust and non-Trust, involved in the present controversy and an analysis of their present status.

2. Description of the Suquamish Indian Tribe as presently constituted and the status of its members in relation to the lands in controversy.

3. Authority of the Suquamish Indian Tribe to promulgate its Code of Laws, affixed as Appendix A to the Memorandum of Authorities of Anicus Curiae filed September 10, 1973.

4. Description of federal or state statutes or regulations, if any, which have limited or restricted the sovereign power of the Suquamish Indian Tribe.

Prior to the hearing, the petitioner filed a Memorandum of Authorities, exhibits, maps, affidavits and sources of authority in compliance with the Court's request. The Respondents caused to file Memorandum of Authorities, exhibits and affidavits. Hearing was

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held on January 25, 1974 in United States District Court. A
randum Opinion of the United States District Court was filed
April 5, 1974, Appendix "A" hereto, infra, pages 1 to 7. Juc
denying the Writ of Habeas Corpus was filed on April 5, 1974.
Appeal was made to the United States Court of Appeals for th
Circuit, that resulted in an opinion being filed on October
affirming the order of the Federal District Court denying th
tion, Appendix "A" hereto, infra, pages 8 to 34.

The majority opinion of the United States Court of Appe
the Ninth Circuit concluded that the Suquamish Indian Tribe,
autonomous state, had jurisdiction over the person of the pe
as a non-Indian, with powers necessary to preserve law and o
upon the reservation, since such powers were not expressly d
by treaty or Acts of Congress. The minority opinion rejecte
concept of sovereignty of an Indian Tribe as applicable to n
members, and by a review of past history and Acts of Congres
cluded that Indian Tribal Courts have no jurisdiction over n
Indians and therefore no express congressional withdrawal ne
made of such jurisdiction.

2. Belgarde vs. Suquamish Indian Tribe et al, Cause No 75-3319.

The petitioner herein, DANIEL B. BELGARDE, a non-Indian
siding on the Port Madison Indian Reservation in Kitsap Cour
Washington, filed a Petition for a Writ of Habeas Corpus in
United States District Court, Western District of Washingtor
Seattle on November 6, 1974, alleging that on October 12, 1
while he was driving on a public highway of Kitsap County,

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Washington, he was forced to stop by officers of the Suquamish
Indian Tribe, who arrested and took him into custody, charged him
with the offence of destruction of private property in violation of
Section 44, Chapter 3 of the Suquamish Tribal Law and Order Code,
and the offense of reckless driving in violation of Section 59,
Chapter 3 of the Suquamish Tribal Law and Order Code; imprisoned
him in the jail of the City of Port Angeles, Washington until
October 4, 1976 pursuant to a contract between the City of Port
Angeles, Washington and the Bureau of Indian Affairs, and that after
having posted bond, he appeared before the Suquamish Tribal Court
for trial, where he was released on his personal recognizance pend-
ing the outcome of a Petition to be filed by him for a Writ of
Habeas Corpus before the Federal District Court of the Western Dis-
trict of Washington at Seattle.

On November 11, 1974, the Federal District Court referred the
case to the United States Magistrate and on November 11, 1974, the
Federal District Court entered an order to show cause requiring re-
spondents a return why the petition should not be granted. On
February 5, 1975, was entered an order setting hearing before the
United States Magistrate.

The petitioner invoked the jurisdiction of the Federal District
Court pursuant to "Article I, §9, Limitations upon powers of Con-
gress, Section 9, Clause 2. (Privilege of the Writ of Habeas
Corpus).", Appendix "B" hereto, infra, page 1 ; "25 USC §1303 Habeas
Corpus", Appendix "B" hereto, infra, page 22; 28 USC §2241 (a); (c),
(1) and (3), Habeas Corpus Powers to Grant Writ", Appendix "B"
hereto, infra, page 23. The Secretary of Interior, as a respondent,
was dismissed from the action and after presentation of affidavits,
memorandums and arguments by the petitioner and respondents, the
United States Magistrate entered a REPORT AND RECOMMENDATION on
August 1, 1975, Appendix "A" hereto, infra, pages 34 - 49.

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Pursuant to that REPORT AND RECOMMENDATION, the United States District Court entered an order denying the petition for a Writ of Habeas Corpus on August 18, 1975, Cause No. C-74-683S, Appendix "A" hereto, infra, Pages 50 - 51.

As set forth in the REPORT AND RECOMMENDATION, the authority for denying the Writ of Habeas Corpus was the decision of the Federal District Court in the Oliphant case in that a tribe retains inherent sovereign powers which included the right to establish a valid justice and law enforcement program without express authority of the United States Congress and that it mattered little whether that jurisdiction was concurrent with that of the United States or the State of Washington in the exercise of such powers.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit has been filed, the record forwarded to that Court, and is now in abeyance pending the decision in the Oliphant case.

BOTH CASES

Relevant to the decision of inherent sovereignty of the Suquamish Indian Tribe, it was made known in the memorandum of authorities, exhibits and affidavits presented in each case, the following:

1. FIRST EXERCISE OF JURISDICTION OF POLICE AND JUDICIAL POWERS OF THE SUQUAMISH INDIAN TRIBE.

The first exercise of claimed sovereignty to exercise police and judicial powers over Indians or non-Indians on the Port Madison Indian Reservation by the Suquamish Indian Tribe was the enactment of the Suquamish Law and Order Code by the Tribe on July 29, 1973, (21 days before the offense of Oliphant and approximately fourteen months before the offense of Belgarde (Appendix "B" hereto, infra, pages 39 - 70). It became the law of the tribe by vote of its members acting under Referendum process without approval of the Secretary of Interior, as provided in its Constitution adopted by

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the tribe in 1965. Article IV, Referendum, Constitution and By-Laws of the Suquamish Indian Tribe, Appendix "B" hereto, infra, page 8. The Constitution and By-Laws of the Suquamish Indian Tribe of 1965 was adopted by vote of its Indian members and approved by the Secretary of Interior as required pursuant to the authority of the Indian Reorganization Act of 1934, Appendix "B" hereto, infra, pages 22 - 28. The Constitution did not otherwise provide for ordinances of legislation by the tribe to be enacted without approval of the Secretary of Interior, Appendix "B" hereto, infra, Page 6 - 8.

The Constitution provided that the territorial jurisdiction of the tribe was of tribal lands and unalloted and alloted lands remaining in trust status of the United States on the reservation, Appendix "B" hereto, infra, page 6.

The preamble of the Law and Order Code recited that it was established: "to protect the lives and property of all persons within the boundaries of the Port Madison Indian Reservation", and the Code did further provide for the establishment of the Suquamish Tribal Courts with jurisdiction over all crimes set forth in the Code, committed by any persons on all tribal and trust allotted lands, fee patent lands, public lands, lakes, streams, waterways, highways and beaches within the territorial boundaries of the reservation, except major crimes. Suquamish Law and Order Code, Preamble, §1 Judicial Code, Article I, II and III; §3, Criminal Offenses, Appendix "B" hereto, infra, pages 39 - 42; Major Crime Act, 18 USC §1153 Offenses Committed within Indian Country, Appendix "B" hereto, infra, page 21.

Other than the United States making the treaty of Point Elliott with the tribe, there is no evidence that prior to the making of the treaty in time until and Law and Order Code was enacted by the tribe in 1973, the tribe existed as an autonomous political state or nation with either police or judicial powers over any persons, Indian

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or non-Indian. Constitution and By-Laws of the Suquamish Indian Tribe (1916), Appendix "B" hereto, infra, page 5; Treaty of Point Elliott, 12 Stat. 927 (1859), Article IX, Appendix "B" hereto, infra, page 11.

2. PORT MADISON INDIAN RESERVATION

The Port Madison Indian Reservation, located on the shores of Puget Sound across the waters from Seattle, Washington in Kitsap County, was created originally as one of two special temporary reservations of land reserved for the use and occupation of all the twenty-two Indian Tribes signing the Treaty of Point Elliott with the United States in 1855. Treaty of Point Elliott, 12 Stat. 927 (1859) Article II, Appendix "B" hereto, infra, page 10; Article VII, Appendix "B" hereto, infra, page 11. It subsequently became enlarged by the addition of public lands of the United States to a total of approximately 7,275 acres in 1864 by order of the Secretary of Interior. Members of the Suquamish Indian Tribe subsequently became located on the reservation to the exclusion of other tribes of the Treaty.

The Treaty forecast a policy of the United States of termination of all tribal community ownership and authority over the lands of the reservation by providing that the President of the United States could subdivide the lands into individual allotments and award the lots to individual families for permanent homes. Treaty of Point Elliott, Article VII, Appendix "B" hereto, infra, Page 11; General Allotment Act (1887), supra, Footnote 3. By the year 1910, all tribal lands of the reservation had been awarded to 49 individual Indians and families except approximately 41 acres reserved for school lands. 33 Stat. 1078 and 1079, Fifty-Eighth Congress, Sess. III, §1479 (1905, Section 6, Article II, Appendis "B" hereto, infra, Pages 17-19. The offense of Oliphant took place on a baseball park reserved in a business lease executed in 1968, of

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36 acres of the last portion of the 41 acres, between the tribe and a non-Indian corporation, for the use of tribal members and their guests and of sublessees of the non-Indian corporation (the remaining 5 acres being a graveyard).

3. INDIAN AND NON-INDIAN POPULATION

In 1902, the total membership of the tribe was recorded in the number of 163 members. In 1916, when the tribe first adopted its constitution, its membership was recorded at 42 members. In 1974, the tribal chairman of the tribe accounted for 50 members of the tribe living on the reservation. The total present membership of the tribe is unknown; it has been estimated at not more than 150 members.

In 1974, the total permanent population of non-Indians living on the reservation in approximately 976 permanent dwellings, paying taxes in Kitsap County, was estimated to be approximately 2,928 persons. In 1974, non-Indians owned approximately 4,597 acres of the total 7,275 approximate acres of the reservation (63%) in fee simple absolute free of trust of the United States, and subject to local real estate taxes of the State of Washington, while approximately 2,637 acres remained in individual Indian allotment status, (36%), with patent held in trust by the United States and exempt from local real estate taxes.

In 1973, there was not any community of Indians living on the reservation in an area separate and apart from non-Indians. Three non-Indian communities of permanent residents exist on the reservation. All public facilities of roads, school, fire and police protection are owned, maintained and operated by authority of the State of Washington. Kitsap County Sheriff's Department and the Washington State Patrol has been and now is enforcing the laws of the State of Washington and Kitsap County for any offenses by non-Indians on non-Indian, as well as Indian land.

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REASONS FOR GRANTING WRIT

1. The concept that an Indian tribe is an independent, autonomous, sovereign state with legislative, police and judicial powers not dependent upon a delegation of authority from the United States over the persons and conduct of all people, including non-Indians, within the territorial boundaries of its reservation within a state of the United States and the United States, unless a treaty with the United States or an act of Congress expressly prohibits such powers, conflicts with principles of the United States Constitution that needs to be resolved by this Court. Such a concept conceives of the origin and existence of such a power independent of and in conflict with the powers delegated to the United States and reserved to the states of the Union and the people of the United States by the United States Constitution. AMENDMENT X, Reserved powers to states. 1. (h), Appendix "B" hereto, page 3. It conceives of an Indian Tribe having inherent reserve powers over non-Indian citizens of a state of the Union equivalent to that of a state of the Union where the reservation is located indirectly contrary to the prohibition of the United States Constitution for the admission of states. ARTICLE VI, §3. Admission of new states; power over territory and other property, Section 3, Clause 1. (Consent of the Legislatures of the States). 1.(e), Appendix "B" hereto, page 2.

As noted in the minority opinion of Circuit Judge Kennedy in the Oliphant case, this Court recognized almost a century ago, only two truly sovereign entities exist at any place within the geographical limits of the United States: the Federal Government and states of the Union. United States v. Kagama, 118 U.S. 375, 379 (1886) Appendix "A" hereto, page 29. An Indian tribe is not a state of the Union and is not a foreign nation. Cherokee Nation v. Georgia, 1831, 5 Pet. 30 U.S. 1. Admission of such powers over non-Indians

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without authority of the United States Constitution, acts of Congress, or legislative action of the states of the Union where the reservation is located denies to a citizen of the United States and a citizen of the state where he resides within the reservation, that the Constitution of the United States is the supreme law of the land and that Bill of Rights has direct application for his protection in the exercise of such powers over him by an Indian government. ARTICLE VI, Debts; supremacy; oath, #2 (Supremacy). 1.(d), Appendix "B" hereto, page 2. Such conflict may not exist as to members of the tribe.[4/] But as to a non-Indian with no rights of representation in the Indian government and the recognization that that tribe has powers of an autonomous state over his person is in conflict in principal with the United States Constitutional mandate that the United States shall guarantee to every state of the Union a republican form of government. ARTICLE VI, §4. Guarantee of republican form of government, Section 4. 1.(f), Appendix "B" hereto, page 2.

2. There is conflict in the interpretation of the laws of the United States in the conception that an Indian Tribe has powers of an autonomous state over non-Indians on a reservation, unless expressly prohibited by treaty or acts of Congress. This Court in Worcester v. Georgia (1832), 6 Pet. (31 U.S.), the decision in which the concept of inherent sovereignty of an Indian tribe is based, (Appendix A hereto, page 9), excluded the extra-territorial jurisdiction of the application of the laws of Georgia to an Indian reservation by preemption of the delegated authority and exclusive jurisdiction of the United States under the United States Constitu-

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[4/] Citizenship of an Indian and tribal membership are not incompatible with exercise of power by the tribe over its members nor does it affect the powers of the United States Government over Indians. M. Price, Law and the American Indian (1973), pages 225 and 226; Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897.

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tion without there being an express denial in the United States Constitution of the application of state laws. ARTICLE I, §8. Powers of Congress, Section 8, Clauses 3 and 17. (Regulate Commerce. . . . With the Indian Tribes) and (Exercise exclusive legislation (ownership United States Government) - paraphrased within context of petition), Appendix "B" hereto, 1.(a), page 1; ARTICLE II, §2. Powers of the President, Section 2, Clause 2. (Presidential powers with the Advice and Consent of the Senate to make Treaties), Appendix "B" hereto, 1.(c), page 1-2.

This Court may resolve for the first time whether the acts of Congress in exercising jurisdiction of the Federal Government on Indian reservations (by establishing crimes of a non-Indian on an Indian reservation and providing for the judicial enforcement thereof) have either expressly or by implication preempted and excluded the same exercise of powers by an Indian tribe over a non-Indian in which the majority and minority opinion of the United States Circuit Court of Appeals do not agree. Appendix "A" hereto: Majority, page 11, Lines 25-32; Page 12; Page 13, Lines 1-16 and Minority, Pages 22-29.

The United States Congress throughout the history of the United States has exercised the jurisdiction of the United States over crimes of non-Indians in "Indian Country" through a series of acts known as the Trade and Intercourse Acts that have remained essentially unchanged until passage in 1953 of Public Law 83-280, 67 Stat. 588, Appendix "B" hereto, pages 24-27, and amendment and partial repeal of Public Law 83-280 in 1968, 25 USC §1321; §1323, Appendix "B" hereto, 8 (c), (d), pages 27-28.

In the Trade and Intercourse Acts Congress has provided that the general laws of the United States as to offenses committed within: ". . the sole and exclusive jurisdiction of the United States. . (emphasized). . ." (i.e. federal enclaves: United States Constitution, ARTICLE I, §8, Appendix "B" hereto, 1.(a), page 1) within

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"Indian Country". Trade and Intercourse Acts, 18 USC §1151, Indian Country Defined; 18 USC §1152, Laws Governing; Legislative history, Section 25 of the Act of June 30, 1834, Section 2146; Revised Statute of 1873, Appendix "B" hereto, 3.(a), (b) and (c), pages 20-21. Excluded from such application of general laws of the United States are crimes committed in "Indian Country" by an Indian against another Indian or his property, crimes by an Indian punished by local law of the tribe, and crimes by anyone where treaty has provided exclusive jurisdiction in the tribe. 18 USC §1152, Laws Governing, Appendix "B" hereto, 3 (b), page 20, lines 22-27. Thus offenses by non-Indians are subject to the jurisdiction of the general laws of the United States and through the Assimilative Crimes Act the laws of the state where the reservation is located, "Indian Country", adopted the criminal laws of the state in which the reservation is located. Assimilative Crimes Act, Appendix "B" hereto, 5 (a) and (b), page 22. Through adoption by the United States of the laws of the state in which the reservation is located a non-Indian is not subject to the enforcement by a state as well as the Federal Government for two crimes of the same offense.

3. This Court should resolve for the first time whether recent acts of Congress in retrocession of the jurisdiction of the United States to states of the Union has by expression or implication, terminated any inherent jurisdiction an Indian Tribe may have over crimes of non-Indians on a reservation by ceding such jurisdiction to individual states of the Union as provided in Public Law 83-280 (1953-67 Stat.588), Appendix "B" hereto, 7.(a),(b) and (c), page 24, Lines 15-31; page 25; page 26, Lines 1-18. Outrightly, without acceptance being necessary by the states of Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, jurisdiction of the United States over criminal offenses committed by or against Indians were transferred to those states and the jurisdiction of the United States under the Trade and inter-

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course Act, became repealed. Public Law 83-280 (1953 - 67 Stat. 588), Appendix "B" hereto, 7.(a) page 24, Line 15 to 31 and page 25, Line 1 to 28. While the state of Washington was not one of those states, jurisdiction was provided to be transferred to it by the United States under Sections 6 and 7 of that act. Public Law 83-280 §6 and §7 (not codified), Appendix "B" hereto, 7.(b), page 25, Line 28 to 32 and page 26, Line 1 to 19.

In 1957 the state of Washington legislature accepted jurisdiction from the United States by providing for tribal resolutions and subsequent proclamations as to individual tribes. Laws of 1957, Chapter 240, Sections 1, 2 and 3, Appendix "B" hereto, page 29 and 30, Lines 1-3. In 1958, the Suquamish Tribe pursuant to such legislation by the state of Washington, resolved and submitted to Governor Rosellini of the state of Washington, its resolution providing:

> "IT IS RESOLVED that the Suquamish Tribal Council hereby requests and expresses its desire that the criminal and civil jurisdiction of the state of Washington be extended to include the people of the Suquamish Indian Tribe and all persons (emphasized) being and residing upon the Port Madison Indian Reservation . . ."

Resolution of the Suquamish Indian Tribe of the Port Madison Indian Reservation, Appendix "B" hereto, page 30, Lines 4 to 30. In 1958, the proclamation of Governor Rosellini accepted jurisdiction pursuant to the tribal resolution, legislation of the United States and of the state of Washington. Appendix "B" hereto, page 32, Lines 1 to 21.

In 1970, the United States Congress, as to the states of Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, amended Public Law 280 wherein previous jurisdiction of crimes by or against Indians was ceded to those states by the United States outright and the jurisdiction of the United States over those crimes was repealed under the Trade and Intercourse Act, 18 USC §1152, and the Major Crimes Act, 18 USC §1153, Appendix "B" hereto, pages 20 and 21.

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Such amendment changed Public Law 280 to provide that the Metlakatla Indian Community "may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended", and did further add that as to all such states, such states would have "exclusive jurisdiction" previously received outright. Amendments - Public Law 280 (1970), Public Law 91-523 84 Stat. 1358, Appendix "B" hereto, 7.(c), page 26, Lines 15 to 32 and page 27, Lines 1 to 7. The amendment indicates as to the state of Alaska that without such amendment the Indian communities of the state of Alaska had no criminal jurisdiction over criminal offenses committed by Indians as a result of the passage of Public Law 280, thus requiring the amendment. The amendment clearly indicates that Congress has expressed that those states who received outright cession of the jurisdiction of the United States over offenses committed by or against Indians, exercise such jurisdiction exclusive of the jurisdiction of the tribes. Such expression in the amendment of 1970 of Public Law 280 in subsection (a) providing for the repeal of the Trade and Intercourse Act, 18 USC §1152 and the Major Crimes Act (which provided for the jurisdiction of all offenses by non-Indians through the Assimilative Crimes Act and the offenses of major crimes by Indians) and stating that the states, as to those offenses, have exclusive jurisdiction, could only mean exclusive of the tribe, for by the repeal itself, the jurisdiction of the United States terminated leaving only in question the jurisdiction of tribes.

Both state and federal courts have construed 18 USC §1162 as conferring exclusive jurisdiction on state governments. See: Anderson v. Gladden, 293 F. 2d 462, 466 (9th Cir. 1961); Robinson v. Sigler 187 N. W. 2d 756 (Neb. Sup. Ct. 1971).

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4. The opinion of the United States Circuit Court in the Oliphant case, Appendix "A", page 14, Lines 8-31; Page 15 and Page 16, and the Report and Recommendation of the Federal District Court Magistrate in the Belgarde case, Appendix "A", Page 41, Lines 24-32; Page 42; Page 43, are in error in holding that the United States did not cede to the State of Washington jurisdiction exclusive of the Suquamish Indian Tribe on the Port Madison Indian Reservation over all offenses by non-Indians thereon and that the State of Washington as to those offenses did re-retrocede such jurisdiction to the United States, and that the United States accepted re-retrocession thereof.

In 1963, the State of Washington partially repealed its law of 1957, except providing that such repeal would not effect jurisdiction previously taken such as on the Port Madison Indian Reservation. Appendix "B" hereto, 5 & 6, page 32, Lines 21-32; page 33-34, Lines 1-6.

In 1968 under the Indian Civil Rights Act, the Congress of the United States provided for re-retrocession by states of jurisdiction of criminal offenses by or against Indians. Public Law 90-284 (1968 - 82 Stat. 78), 25 USC §1321, §1323, Appendix "B" hereto, 8 (c), (d), page 27, Line 18; page 28, Lines 1-12.

In 1971 the Suquamish Indian Tribe resolved and submitted a resolution to Governor Evans of the State of Washington, for the State of Washington to re-retrocede jurisdiction of the State of Washington to the United States. Appendix "B" hereto, page 34, Lines 7-31, page 35, Lines 1-14. In 1971, Governor Evans, without authority of the Washington Legislature, by Governor's Proclamation re-retroceded to the United States jurisdiction over the Suquamish Port Madison Indian Reservation, except as provided under Chapter 36, Laws of 1963, supra. Proclamation of Governor, Appendix "B" hereto, page 35, Lines 14-31, page 36, Lines 1-11. In 1972, the office of the Secretary of Interior of the United States accepted

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re-retrocession in accordance with Governor Evans Proclamation, except as provided under Chapter 36, Laws of 1963, supra. Secretary of Interior Notice of Acceptance of Retrocession. Appendix "B" hereto, page 36, Lines 11-31.

The state statute accepting retrocession as to non-Indians intended to confer, so far as offenses by non-Indians "in Indian territory" are concerned, exclusive jurisdiction over such offenses in the laws of 1957 as well as the laws of 1963 which are the same in relation thereto and the laws of 1963 did not amend or repeal that portion stating:

"The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian Territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953". (emphasized) (Public Law 280, 83rd Congress, 1st Session). See: Section 1, Laws of 1957, Appendix "B" hereto, page 29, Lines 9-15 and Laws of 1963, Appendix "B" hereto, Page 32, Lines 24-29.

The only amendment of the law of 1957 by the law of 1963 was that the above-quoted paragraph did not apply to Indians, except that it did apply to Indians on operation of motor vehicles upon public streets, alleys, roads and highways and where prior to 1963, as to them as well as to non-Indians, a tribe had petitioned for state jurisdiction and a Governor's Proclamation had been issued, such as the Suquamish Indian Tribe and Governor Rosellini had accomplished.

Thus not only as to the Suquamish Indian Tribe, by virtue of its petition and proclamation, had such jurisdiction over all offenses by any persons on the Port Madison Indian Reservation become absolute, as expressly stated in the laws of Washington 1957 and 1963, the laws of 1963 repealed the laws of 1957 only as to offenses

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of Indians on their tribal or allotted lands, except on the operation of motor vehicles on public highways within the reservation.

The opinions in the Oliphant and Belgarde case are in conflict in that the jurisdiction taken by the State of Washington was not exclusive with the opinion of the Federal District Court decision: In Yakima Nation v. State of Washington, D. C. No. 2732 (E.D.Wash. 1972), appeal pending CA No. 74-1225 (9th Cir.), where the court expressly held that the state had exclusive jurisdiction rather than concurrent jurisdiction with the tribe under state law. Likewise, the State Attorney General, when asked whether "the jurisdiction assumed by the State pursuant to #1, chapter 36, Laws of 1963, (is) exclusive or concurrent with tribal jurisdiction", concluded that "to the extent that the state of Washington had assumed criminal and civil jurisdiction pursuant to #1, chapter 36, Laws of 1963, that jurisdiction is exclusive." AGO 63-64, No. 68.

Though the Secretary of Interior exercising plenary powers of the United States (may have accepted partial or illegal re-retrocession under state laws in 1972 conferring jurisdiction in the United States (See: Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971), aff'd 460 F. 2d 1327 (8th Cir. 1972), cited Majority Opinion, 9th Circuit Oliphant case, Appendix "A" hereto, page 16), the Proclamation of Governor Evans in 1971 and the acceptance by the Secretary of Interior in 1972, qualified what jurisdiction was being taken by reference to the 1963 laws of Washington. Such qualification expressly could confer by such law of 1963, re-retrocession to the United States of jurisdiction over offenses of Indians on tribal or allotted lands with the eight numbered exceptions including operation of motor vehicles on public highways. The Secretary of Interior accepted only partial jurisdiction, if any, over offenses of Indians on the Port Madison Indian Reservation.

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5. The decisions in the Oliphant and Belgarde case for the first time in the history of the United States have judicially determined that Indian tribes recognized by the United States are autonomous states with inherent powers of sovereignty over non-Indians on their reservation and that such powers include the right to promulgate general criminal laws applicable to them, enforce those laws by their independent police forces, and prosecute and adjudicate in their tribal courts the guilt or innocence of offenses by non-Indians occurring on Indian reservations, unless expressly prohibited by treaty or acts of Congress of the United States.

Such powers are held to exist even though held not to exist almost a century ago.[5/]

The decisions are contrary to the long standing policy and administrative practice by the United States over Indian affairs where laws, Indian police and the courts on Indian reservations have been administered by the United States and limited to offenses by Indians only. Act of March 3, 1971, 25 USC §71, Appendix "B" hereto, Page 19; Indian Civil Rights Act, Public Law 90-284 (1968 - 82 State. 78), 25 USC §1311 Model Code, Appendix "B" hereto, page 27, Lines 13-17; 25 CFR §11.1 Application of Regulation; 25 CFR §11.2 Jurisdiction; 25 CFR §11.22C Jurisdiction, Appendix "B" hereto, Page 37.

It is important that the decisions be reviewed by this Court for the law established by the opinions effect the life and liberty of many non-Indian persons on Indian reservations and may result in duplication and conflict in the application and enforcement of similar criminal laws of many states of the Union where Indian Reserva-

5/ See: Ex Parte Kenyou, C.C. W.D. Ark., (1878) Fed. Cas. No. 7720, 14 Fed. Cas. 353 (Cited Majority Opinion, Appendix "A" hereto, page 8 & 13 and Minority Opinion, Appendix "A" hereto, page 21); See: M. Price. Law and the American Indian, (1973), pages 171, 172 and 173.

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tions are located with the action of tribes on those reservations within those states. It is believed that some of those states shall submit petitions for the granting of the petitions herein.

CONCLUSION

For the foregoing reasons, the petition for Writs of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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No. 76-5729

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
PETITIONERS

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE, PETITIONERS

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's order of February 22, 1977, inviting the Solicitor General to express the views of the United States.

QUESTION PRESENTED[1]

Whether the Suquamish Indian Tribe has jurisdiction to try non-Indians for misdemeanors committed on trust land within the Port Madison Reservation.

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[1]We state here only the question presented by the *Oliphant* petition. In our view, the *Belgarde* case, which has not yet been decided by the court of appeals, should not be reviewed at this time. Under Rule 20 of the Rules of this Court, a writ of certiorari will be granted prior to judgment in the court of appeals "only upon a showing that the case is of such imperative public

STATEMENT

The material facts in the *Oliphant* case are set forth at length in the opinion of the district court (Pet. App. A 1-4).

The Port Madison Reservation, located entirely within the borders of the State of Washington, is the home of the Suquamish Indian Tribe. The reservation consists of more than 7,000 acres, of which approximately 36 per cent are held in allotment status, *i.e.*, are being held in trust for individual Indians pursuant to the General Allotment Act of 1887, 24 Stat. 388, and its successors. In addition, 41 acres of land are held in trust by the United States for the benefit of the Suquamish Tribe (Pet. 16-17).

The Suquamish Tribe is organized under the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. 476 *et seq.* In 1965 the Tribe adopted a Constitution and By-Laws, which were approved by the Secretary of the Interior,[2] and in 1973 it enacted a Judicial Code creating a tribal trial court and court of appeals (Pet. App.

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importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." No such showing has been made here. In addition, *Belgarde* may be distinguishable from *Oliphant* because the offense in *Belgarde* was alleged to have taken place on non-trust land (Pet. App. A 40).

To the extent the correct disposition of *Belgarde* is governed by the result in *Oliphant*, there is no need to grant review in the former case before judgment in the court of appeals. To the extent any factual difference might render the cases distinguishable, this Court should, before undertaking review of the case, have the benefit of the views of the court of appeals regarding the legal significance, if any, of the factual difference between *Belgarde* and *Oliphant*.

[2]Selected portions of the Constitution and By-Laws are reprinted at Pet. App. B 6-8.

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B 39 *et seq.*). Section 3 of Art. III of the Code (*id.* at 41-42) asserts that the tribal court shall have original jurisdiction over all but "major crimes,"[3] committed by Indians or non-Indians, occurring anywhere on the reservation.

On August 19, 1973, a few weeks after adoption of the Judicial Code, the Suquamish Indians were holding an encampment to celebrate a tribal holiday, Chief Seattle days. An incident, the precise character of which is unclear, led to the arrest by tribal authorities of petitioner Mark David Oliphant (a non-Indian) for assaulting a tribal officer and resisting arrest.[4] The alleged acts of Oliphant and his arrest both occurred upon the land held in trust for the tribe by the United States.

Oliphant was arraigned before the tribal court, and bail was set at $200. He did not put up bail and was briefly incarcerated in a local city jail until his release on his own recognizance.[5] On August 23, 1973, Oliphant petitioned for a writ of habeas corpus in the United States District Court for the Western District of Washington, pursuant to 25 U.S.C. 1303 (the Indian Civil Rights Act), challenging the jurisdiction of the Suquamish Tribal Court to try him, a non-Indian, for acts allegedly committed on the reservation (Pet. 10).[6]

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[3]As defined in 18 U.S.C. 1153; but see limitations on tribal court powers set forth in the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. 1302.

[4]See Chapter III, Tribal Code (Pet. App. B 47, 64): Assault (30 days and/or $60); resisting arrest (60 days, $120) (Pet. App. B 48, 64).

[5]The city houses tribal prisoners by agreement with the United States Department of the Interior (Pet. App. A 2).

[6]The district court did not address the issue of post-release eligibility for habeas corpus relief. The court of appeals, however, held that "Oliphant's release on his own recognizance [on August 24, 1973] did not deprive the district court of [habeas corpus] jurisdiction," citing *Hensley* v. *Municipal Court*, 411 U.S. 345 (Pet. App. A 9). Respondents do not now challenge this holding.

The district court denied the petition, holding that the Suquamish Tribe's inherent sovereignty, which includes the right to enforce criminal laws of general application, has been limited but never divested or terminated by Congress (Pet. App. A 3-6). A divided panel of the court of appeals affirmed. It concluded that no treaty, act of Congress, or act of the State of Washington deprived the tribe of its inherent power to try non-Indians as well as Indians for crimes committed on the reservation (Pet. App. A 9-16) and that the tribe's exercise of jurisdiction did not "interfere with or frustrate the policies of the United States" (Pet. App. A 16).

In dissent, Judge Kennedy noted that the issue of Indian jurisdiction over non-Indians had not been addressed in the federal courts since 1878. In the absence of clear judicial precedent supporting or denying the validity of such tribal jurisdiction, he reasoned, various Attorney General and Interior Department opinons, court of appeals dicta, and congressional remarks indicating that tribes lacked such jurisdiction, should govern this case (Pet. App. A 21-23).

DISCUSSION

The court of appeals noted that "[t]his case involves a question of Indian law which has been unresolved since it first arose almost a century ago * * * " (Pet. App. A 8). In fact, the decisions of the district court and court of appeals in this case appear to be the first reported decisions ever to pass upon the question whether Indian tribal courts have jurisdiction over offenses committed by non-Indians on tribal trust lands. Were the issue more narrow or of less immediate importance, or were the opinions of the court of appeals less thorough and thoughtful, we might suggest that this Court postpone review of this question until other circuits had considered it or, perhaps, Congress had addressed the matter by legislation. But this case involves difficult issues regarding not only the scope of inherent

tribal sovereignty but also the effect of broad federal statutes, including 18 U.S.C. 1152 (Laws Governing in Indian Country) and Pub. L. 280, 67 Stat. 588, 25 U.S.C. 1321 *et seq.* (State jurisdiction over Indian lands). Moreover, the decision below, directly or indirectly, may greatly stimulate the exercise of tribal court criminal jurisdiction over non-Indians on reservations throughout the United States, and no prompt legislative resolution appears to be in the offing. Under these circumstances, we believe that the Court should grant the petition for a writ of certiorari at this time.

1. The questions presented in this case are of considerable importance to Indian tribes throughout the United States. Although Indian tribal courts were generally less conspicuous during the 19th and early 20th Centuries than they have become, recent statistics compiled by the Department of Interior indicate that tribal courts are presently operating on approximately 71 reservations and that more than 30 tribes have enacted ordinances asserting criminal jurisdiction over non-Indians. The Final Report of the American Indian Policy Review Commission indicates that such courts, though varying in individual performance, in general "are evolving institutions * * * capable of fair and efficient justice." Report, p. 5-42.[7] The ability of tribal Indians to adjudicate their grievances through established tribal courts is regarded as an important aspect of Indian law enforcement and self-government. *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F. 2d 1140, 1144-1145 (C.A. 8).

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[7] The Commission was established by Pub. L. 93-580, 88 Stat. 1910, "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians" (25 U.S.C. (Supp. V) 174). The Commission's Report was submitted to the Congress on May 17, 1977.

The Indian tribes need to know, for very practical reasons, whether they have criminal jurisdiction over non-Indians on trust land within their reservations. Although many tribes have cooperative relationships with state authorities, state courts frequently lack jurisdiction over reservation matters,[8] and in any event, available state personnel, as this case demonstrates (Pet. App. A 17), may prove inadequate to protect tribal interests. Federal authorities are often located at considerable distances from Indian reservations or, as this case also demonstrates (*ibid.*), may not be available at all. See Hearings on S. 1 and S. 1400 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., Part VIII, pp. 6469 *et seq.* (1973). If tribes lack the power to enforce tribal laws against non-Indians in tribal court, that deficiency should be made clear so that efforts may be concentrated on development of other avenues of law enforcement. Should tribes have that power, on the other hand, a decision of this Court to that effect will eliminate the present uncertainties and permit state, federal, and tribal governments to share law enforcement responsibilities in accordance with settled principles.

While we believe that the extent of tribal court jurisdiction over non-Indians is ultimately a fit subject for legislative disposition, legislative resolution of this question does not appear imminent. The current proposal for revision of the Federal Criminal Code does not attempt to alter the existing state of tribal court jurisdiction. The American Indian Policy Review Commission, while favoring tribal jurisdiction over non-Indians, does not

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[8]States generally lack criminal jurisdiction over matters involving Indians within a reservation unless they have acquired such jurisdiction in accordance with the provisions of Pub. L. 280 (25 U.S.C. 1321 *et seq.*). See p. 9; *infra*.

propose enactment of any new legislation on that subject. It does not seem appropriate, therefore, to postpone review of this issue in the expectation that Congress will act in the immediate future to clarify or settle the law.

2. From a legal as well as practical standpoint, the issues in this case are difficult and important. The power of Indian tribal courts to try non-Indians for crimes committed within Indian territory has over the years been the subject of intermittent comment. During the 19th century two opinions of the Attorney General (2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855)) and dictum in a single federal case (*Ex parte Kenyon*, 14 Fed. Cas. 353 (C.C. W.D. Ark.)) stood for the proposition that tribal courts lacked such jurisdiction. The circuit court in *Ex part Kenyon* stated (14 Fed. Cas. at 355): "[T]o give [the Cherokee tribal] court jurisdiction of an offender, such offender must be an Indian, and the one against whom the offence is committed must also be an Indian." This observation, like the analysis in the Attorney General's opinions, rested at bottom on construction of Section 25 of the Trade and Intercourse Act of 1834, 4 Stat. 733, now 18 U.S.C. 1152 (as modified).

That earlier viewpoint has been sporadically repeated during the 20th century. In 1960, for example, a Senate Report supporting a bill to prohibit unauthorized entry on Indian land for the purpose of hunting or fishing took the position that "[n]on-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges" (S. Rep. No. 1686, 86th Cong., 2d Sess. 2-3 (1960)). Ten years later, an opinion of the Solicitor for the Department of Interior, 77 I.D. 113, 115, stated: "[U]nless there still remains in force a treaty provision whereby a tribe acquired '*exclusive jurisdiction over such offense*' as provided by [18 U.S.C.] 1152, Indian

tribes generally do not possess criminal jurisdiction over non-Indians" (emphasis in original). That opinion subsequently was withdrawn.

The court of appeals, on the other hand, found these opinions and statements to be totally incompatible with recognized doctrines of tribal sovereignty. Noting that "the various Indian tribes were once independent and sovereign nations * * * " (*McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172; Pet. App. A 9), the court found no express action by Congress revoking the sovereign tribal right "to preserve order on the reservation, when necessary by punishing those who violate tribal law" (Pet. App. A 9-10). Unlike the circuit court in *Ex parte Kenyon, supra*, the court of appeals viewed 18 U.S.C. 1152 as establishing *concurrent* federal and tribal jurisdiction over crimes by non-Indians within Indian country without "attempt[ing] either to extinguish tribal jurisdiction or to declare federal jurisdiction exclusive" (Pet. App. A 11-12). The court also rejected (Pet. App. A 7-9) the argument that tribal jurisdiction over non-Indians on the Suquamish Reservation had been preempted by the authority of Pub. L. 280, 25 U.S.C. 1321 *et seq*.

Resolution of these questions, in our view, may require detailed consideration of the nature and scope of inherent tribal sovereignty as well as the effect on tribal jurisdiction of the provisions of 18 U.S.C. 1152 and Pub. L. 280, 25 U.S.C. 1321-1323. The majority and dissent below disagreed at the outset over whether the Tribe's inherent sovereignty (apart from the effect of any congressional enactments) encompasses the power to try non-Indians for offenses committed within the Reservation, an issue with implications far beyond the present case. In addition, a fresh examination of 18 U.S.C. 1152 may be needed to determine whether its predecessors conferred exclusive jurisdiction

upon federal courts, a plausible contention that nonetheless is not made clear by either the language of the statute or its legislative history.

Finally, we note that the Attorney General of Washington has claimed to exercise Pub. L. 280 jurisdiction on trust lands, as to non-Indians only, despite a state statute apparently disclaiming any jurisdiction whatever over such lands. It may be necessary, therefore, to determine the extent of jurisdiction that Washington has over trust land pursuant to its own laws of 1963 (see Pet. App. B). Were the State Attorney General's contention sustained, it would then be necessary to determine whether a State, consistently with Pub. L. 280 and the Constitution, may assert jurisdiction only over non-Indians in selected areas within the reservation,[9] and, if so, whether such jurisdiction must be deemed exclusive of that of the tribe.

The underlying issue is sensitive and socially significant. While quiescent in the past, the issue now must be confronted. Whatever steps are to be taken in arriving at a wise allocation of power and responsibility in the future should be considered against a background of clear and settled present law, which does not exist today. Accordingly, despite the absence of a conflict in the circuits, we believe that this case merits review by this Court.

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[9]In *Confederated Bands and Tribes of the Yakima Indian Nation* v. *State of Washington*, No. 74-1225, decided April 29, 1977, a panel of the Ninth Circuit has held that the State of Washington could not constitutionally exercise jurisdiction over specified lands within Indian country but refuse to exercise jurisdiction over tribal trust lands.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

JUNE 1977.

Supreme Court, U. S.
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I.

INTEREST OF AMICUS CURIAE

The split decision (2 to 1) by the Ninth Circuit Court of Appeals in *Oliphant v. Schlie, et al.*, (No. 74-2154, August 24, 1976, unreported) has concluded that an Indian tribe has jurisdiction to prosecute in tribal court non-Indians who while on an Indian reservation commit acts which are declared to be crimes under the tribal criminal code. Both the majority and the dissent have explicitly recognized that this question has been unresolved

since *Ex parte Kenyon*, 14 Fed. Cas. 353 (D.C.W.D. Ark. 1878, No. 7720), which rejected the assertion of such tribal jurisdiction.

The Attorney General of the State of Washington submits that these decisions (*Oliphant* and *Belgarde v. Suquamish Indian Tribe* (Ninth Cir. No. 75-3319, not yet decided) will have a substantial impact upon a number of citizens in the State of Washington and upon the state itself. There are 23 Indian reservations within the State of Washington (see the BIA map which is incorporated in this brief at p. 16). Four of those reservations are located east of the Cascade Mountains in the more sparsely populated areas of the state, although there are within the boundaries of the Yakima Reservation in Eastern Washington two cities having populations in excess of 3,000—Wapato, 3,050 and Toppenish, 6,000. The non-Indian population is greater than the Indian population on the two largest reservations in the state, the Yakima and Colville Reservations in Eastern Washington. The remaining 19 reservations are located in Western Washington, which is the population center of our state, which has a population of 3,494,124.

The Port Madison Reservation, which is the reservation upon which the events giving rise to this decision occurred, is reasonably typical of Indian reservations in the State of Washington. By air or water it is within approximately ten miles of Seattle, the state's largest city with a popula-

tion of 503,500. The reservation consists of 7,275 acres, of which 63% is privately owned in fee simple absolute, free of any trust by the United States. Only approximately 1% is tribally owned, and the remaining 36% remains in allotment status with the patent held in trust by the United States. The approximate population of the Port Madison Reservation is 2,928, of which only 50 are tribal members. The total tribal membership of the Suquamish Indian Tribe is unknown but is estimated to be approximately 150, of which, as indicated above, only 50 live on the reservation. We would emphasize that these statistics with reference to the Port Madison Reservation are reasonably typical. The original boundaries of one of the Puget Sound reservations; i.e., the Puyallup, includes a substantial portion of the city of Tacoma, the state's second largest city.[1]

Thus, thousands of the state's non-Indian citizens reside and work on Indian reservations. They occupy property which they have purchased, or their ancestors have acquired, and have created their homes and cities within reservation areas. Such citizens are not in the status of transients consenting to jurisdiction by their temporary presence. In light of these established living patterns, it

[1] The original Puyallup Reservation encompassed some 18,000 acres, of which all but approximately 33 have been transferred to non-Indian ownership. While the Ninth Circuit resurrected the reservation, there remains the unsettled question as to whether the original boundaries are still intact or whether the reservation may have been diminished in size. See, *U.S. v. Washington*, 496 F. 2d 620 (9th Cir. 1974, cert. den. 419 U.S. 1032).

would be most difficult for such citizens to change their homes and jobs in order to avoid being subject to tribal laws from which they are precluded in having a voice in the creation, enforcement, or adjudication, but nevertheless under the Ninth Circuit determination are subject to those laws. This presents a question of great concern to those citizens and to the state itself.

The State of Washington in response to the Congressional authorization permitting the state's assumption of jurisdiction over Indian reservations, Public Law 83-280 (67 Stat. 588 (1953) (App. B. 24-26)[2] enacted chapter 240, Laws of 1957 (App. B. 29-30)), which provided that upon the petition of the governing body of the tribe the state would assume full jurisdiction to the extent authorized by Public Law 280. In response to that federal and state legislation, nine[3] tribes petitioned for, and the state accepted and has exercised, full jurisdiction. Subsequently in 1963 the Washington state legislature enacted chapter 36, Laws of 1963 (App. B. 32-34), whereby the state assumed the responsibility for full jurisdiction without the necessity of petition by the governing body of the tribe for all non-Indians within the boundaries of a reservation. Further, the state assumed full and complete juris-

[2]All references to App. are to the appendix to Petitioners' brief.

[3]Two of the tribes which originally petitioned for jurisdiction under the 1957 act subsequently requested and the governor granted proclamations of retrocession which were thereafter accepted by the federal government. For those two tribes, the Quinault and the Suquamish, the state's jurisdiction is exercised pursuant to the 1963 state jurisdictional act.

diction over tribal members for the purposes of (1) compulsory school atendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon the public streets, alleys, roads and highways. The state also assumed complete and full jurisdiction over tribal members for all other purposes within the reservation except for acts that occurred on tribal or allotted lands.

Pursuant to both the 1957 and 1963 acts, the State of Washington has consistently taken full and complete jurisdiction over all non-Indian acts that occur within the boundaries of the reservations of this state. This assumption of jurisdiction has been a matter of exclusive jurisdiction as is reflected in the Washington Attorney General Opinion, AGO 63-64 No. 68.

II.

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

The split decision by the Ninth Circuit (2 to 1) has observed both in the majority opinion and in the dissent that Indian tribal jurisdiction over criminal conduct by non-Indians has been unresolved by the courts of the United States for almost 100 years. We submit that the magnitude of change reflected by this decision; i.e., recognition of Indian jurisdiction for criminal matters over non-Indians, requires review by this Court, and, we submit, a re-

versal of that decision by this Court. The dissenting opinion set forth in Appendix A, commencing at page A. 21, clearly states the basis for the reversal of this decision. We will attempt to avoid being repetitious, but feel it is necessary to highlight portions of that opinion.

(1) No federal court has had occasion to pass upon the issue of Indian jurisdiction over non-Indians for criminal purposes since *Ex parte Kenyon*, 14 Fed. Cas. 373 (No. 7720, W.D. Ark. 1878 (App. A-21).

(2) Silence in the Treaty of Point Elliott (12 Stat. 927 (1859)) with the Suquamish on the subject of tribal court jurisdiction cannot be taken as assent to jurisdiction over all persons since in earlier treaties when Congress intended it, it has specifically permitted jurisdiction by Indians over non-Indians. (App. A-24). The Treaty of Point Elliott was signed in 1855, hence 7 Op. Atty. Gen. 174, 179 (1855) with reference to the Chocktaw Treaty is pertinent. In response to that treaty the United States refused to affirmatively grant to the Chocktaw Tribe the power to try non-Indians. In so refusing the federal government indicated that it did not consider that power to be an inherent attribute of tribal sovereignty. (App. A-24, 25).

(3) Congress has explicitly provided for exclusive jurisdiction in federal court for major offenses committed by Indians and it would be anomolous to conclude that while tribal courts did not

have jurisdiction to try their own members for major offenses, they retained under some concept of sovereignty the ability to try non-Indians for those same offenses. (App. A-26)

(4) Congress has specifically provided in 18 USC 1165 for a remedy to prohibit unauthorized entry on Indian land for the purposes of hunting and fishing. Congressional statements made in conjunction with that legislation (App. A-27) indicate that the purpose for the legislation is "the fact that Indian tribal law is enforceable against Indians only; not against non-Indians."

The petition for the writ of certiorari filed on behalf of Mr. Oliphant and Mr. Belgarde has extensively set forth reasons which we believe support the granting of a writ of certiorari by this Court. We will not burden the Court by repeating and reiterating the arguments set forth in that petition. We will seek to confine our comments to additional matters that we believe further support the request that the writ of certiorari be granted.

In *U.S. v. Mazurie*, 419 U.S. 544 (1975), Mazurie was convicted in federal court of introducing spirited beverages into Indian country (the Wind River Reservation, Wyoming) in violation of 18 USC 1154. In 1953, Congress had passed local option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country so long as state law was not violated (18 USC 1161).

Mazurie operated a liquor outlet within the reservation which was permited by the tribe. The tribe subsequently changed the ordinance and denied a renewal of his license but be continued to sell without the tribally required license. He was tried and convicted for a violation of 18 USC 1154. The significance of the *Mazurie* case to the present proceeding is the fact that this Court extensively discussed:

(1) The question of Congressional power over the reservation area.

(2) The ability of Congress to delegate power to the local Indian tribes; i.e., the local option.

That extended discussion relating to Congressional authority to delegate is basically inconsistent with the approach of the Ninth Circuit in *Oliphant* which has assumed as an attribute of sovereignty that Indian tribes have all powers not restricted by the federal government. The approach taken by the Ninth Circuit, if valid, would mean that this Court extentively discussed issues not necessary for the resolution of the *Mazurie* case. We make this statement with the awareness that this court, *supra*, at 557, stated:

> "We need not decide whether this independent authority [tribal authority] is itself sufficient for the tribes to impose Ordinance No. 26."

This statement appears to reserve the question of tribal jurisdiction to determine whether liquor would or would not be permitted upon the reservation not the question of what would be the appro-

priate forum to try Mazurie for an alleged violation. It is noteworthy that the criminal prosecution in *Mazurie* was in federal court, not in tribal court.

Mazurie cited *Williams v. Lee*, 358 U.S. 217 (1959), in which a non-Indian operating a store within the Navajo Reservation pursuant to a federal license brought suit in Arizona state court to collect a debt from an Indian customer residing on the reservation. While this Court concluded that the state did not have jurisdiction since the transaction involved an Indian on the reservation, the Court did observe, *supra*, at 220:

> "* * * and state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. *E.g., New York ex rel. Ray v. Martin*, 326 U.S. 496. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. *Donnelly v. U.S.*, 243, 269-272; *Williams v. U.S.*, 327 U.S. 711. * * *"

The second sentence of the above quote refers to a crime by or against an Indian. Congress and the courts have recognized tribal jurisdiction over their own members for acts which occur within the reservation unless such jurisdiction has been limited or modified by Congressional action. There is, however, a lack of authority to support the proposition that the tribe has jurisdiction against a non-Indian for an act committed against an Indian within a reservation. Neither of the cases cited in the above quotation involve prosecutions in tribal court. Rather, both re-

lated to prosecutions in federal court. In *Donnelly v. United States*, 228 U.S. 243 (1912), a non-Indian killed an Indian on the Hoopla Valley Reservation in California. The court held the federal court was the proper jurisdictional tribunal. In *Williams v. U.S.*, 327 U.S. 711 (1946), a non-Indian was charged with statutory rape of an Indian girl within the reservation. Again, the proper jurisdictional forum was the United States federal district court.

The most recent federal court decision cited by both the majority and the dissent relative to the jurisdiction of an Indian tribe over non-Indians is a decision in 1878, *Ex parte Kenyon*, *supra*. Kenyon had been convicted in the Cherokee tribal court for larceny and sought by habeas corpus to challenge the jurisdiction of that tribal court. Kenyon had been married to a Cherokee for six years and had lived on the reservation during that marriage. Upon his wife's death, he left the reservation taking with him a horse that had belonged to his wife. He was charged in tribal court with the removal of that property. The federal court recognized that there was a possibility that Kenyon had become a member of the Cherokee tribe by virtue of his marriage and his living on the reservation. Notwithstanding that possibility, the court concluded that at the time of his arrest, he was a resident of Kansas and of the United States and was not a tribal member either by not having become one or, if so, he had abandoned that status. The court concluded he was therefore

not subject to tribal jurisdiction since tribal courts only have jurisdiction over tribal members committing an act against another tribal member.

While the *Kenyon* case is not a decision of this Court, it has represented the law on this subject for nearly 100 years. As a result, there had not been litigation wherein a tribe has sought to assert criminal jurisdiction over non-Indians for an act occurring within a reservation. As both the majority and dissent indicated in *Oliphant*, this decision by the Ninth Circuit now finding such jurisdiction to exist is new, novel, and without precedent.

The dissenting opinion has correctly indicated the labeling of tribes as sovereign entities has normally been with reference to a dispute between the exercise of a state power and conflict with federal power re regulating commerce with Indians. There are different considerations present when weighing the power of an Indian tribe as it affects the personal lives of non-Indians.

In that context we believe that this Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957), is pertinent to the present litigation. Two cases were combined. Mrs. Covert killed her husband, an Air Force sergeant, while stationed at a military base in England. In the companion case, Mrs. Smith killed her husband, who was in the United States Army, at a military post in Japan. Both of these spouses were tried in military court for the homicides. Congress had explicitly provided in the Code of Military Jus-

tice that such spouses were subject to the jurisdiction of the military court. Further, the United States had an executive agreement with Britain and with Japan which provided that the U.S. military courts had exclusive jurisdiction over U.S. military and their dependents (*supra* at 15). In considering the *Reid* case, this Court observed:

> "* * * In view of our heritage and history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomolous to say that trial before a civilian judge by an independent jury picked from the common citizenry are not fundamental rights." *Supra* at 10.

Further,

> "* * * The most transcendant privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Supra* at 9-10.

This Court concluded that the constitutional rights of United States citizens protect them from actions by the United States government even when our citizens are abroad. Considering the constitutional right to a jury trial which is not available under the military code of justice, the court found that the federal legislation which attempted to make military dependents subject to the military court jurisdiction was invalid. The court further considered the executive agreements with Great Britain and Japan, which also provided for U.S. military courts having exclusive jurisdiction over military

dependents. The court observed that treaties (i.e., the executive agreements) had to meet the same constitutional standards that would apply to the federal government insofar as their impact upon American citizens. Thus, those agreements could not be used as a basis for conferring jurisdiction upon the military courts. We believe that it is consistent with the *Reid* decision to conclude that the United States government could not, by treaty with Indians within the territorial limits of the United States, provide that those tribal entities would have jurisdiction to criminally try non-Indians for acts that occurred within the reservation.

We would submit that it would be equally improper under the *Reid* decision to conclude that the United States government in executing treaties with the Indian tribes could by indirection; i.e., simply making no mention in the treaties, accomplish that which would be impermissible for specific inclusion; i.e., the conferring of jurisdiction upon the Indian tribes to try non-Indians in Indian forums for criminal offenses.

III.
CONCLUSION

We respectfully submit that the law over the last 100 years to the effect that tribal courts do not have jurisdiction to try non-Indians for criminal offenses is correct. The Ninth Circuit decision now finding that such authority exists created a situation in which long-time residents of Indian reserva-

tions who cannot participate in the governmental process by which a tribe formulates tribal law, enforces the same, or adjudicates the same, will nevertheless be subject to those laws. This violates the very concept of our governmental system which assures its residents an opportunity to participate in the governmental process affecting their lives. We submit that the questions presented by the petitions in this case go well beyond the question of whether Mr. Oliphant and Mr. Belgarde should or should not be convicted of specified cimes. Our interest in this proceeding is the impact upon the citizens of the State of Washington who live on these reservations wherein frequently the Indian population constitutes a very small percentage of the total; for example, on the reservation in question less than 2% of the population are members of the Suquamish Indian Tribe. We therefore respectfully submit that the petitioners' application for writ of certiorari be granted.

DATED this 21st day of December, 1976.

SLADE GORTON,
Attorney General

EDWARD B. MACKIE,
Deputy Attorney General,

Attorneys for Amicus Curiae
State of Washington

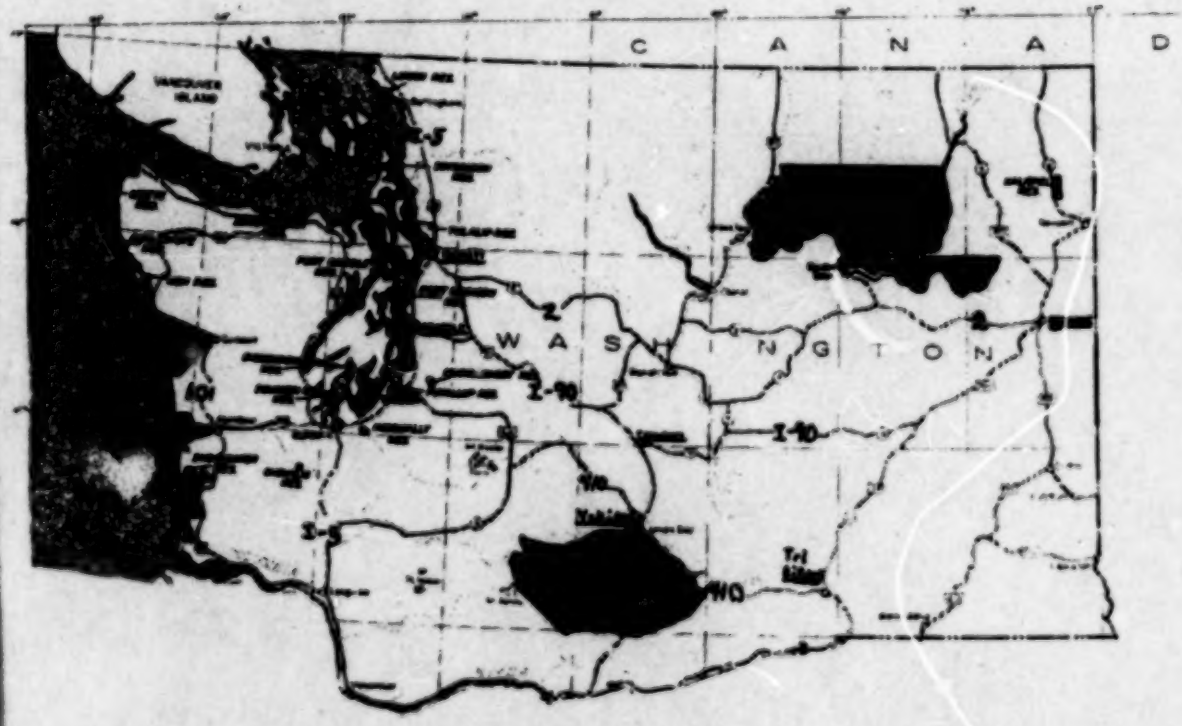
I hereby certify that on this 22nd day of December, 1976, three copies of Brief of Attorney General of the State of Washington as Amicus Curiae in

Support of Jurisdictional Statement were mailed, postage paid, to Philip P. Malone, Attorney at Law, 153 1st Avenue, Poulsbo, Washington 98370, attorney for petitioners; Ron Sims, Acting United States Attorney, 1012 U.S. Courthouse, Seattle, Washington; Richard Neely, Regional Solicitor, Department of the Interior, P. O. Box 3621, Portland, Oregon; Robert H. Bork, Solicitor General, Room 5143 Justice Building, Washington, D.C.; and Barry Ernstoff, Ziontz, Pirtle, & Morisett, 200 Pioneer Bldg., 610 1st Avenue, Seattle, Washington 98104. I further certify that all parties required to be served have been served.

EDWARD B. MACKIE,
Deputy Attorney General
Temple of Justice
Olympia, Washington 98504

APPENDIX A

PROXIMITY OF INDIAN RESERVATIONS TO MAJOR POPULATION CENTERS IN WASHINGTON STATE



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE, Petitioners

V.

THE SUQUAMISH INDIAN TRIBE, et al, Respondents

MEMORANDUM OF AMICUS CURIAE, KITSAP COUNTY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN C. MERKEL
Kitsap County Prosecuting Attorney
PAUL S. MAJKUT
Deputy Prosecuting Attorney
Kitsap County Courthouse
614 Division Street
Port Orchard, Washington 98366
Telephone: (206) 876-7174
Attorneys for Amicus Curiae,
Kitsap County

10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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MEMORANDUM OF AMICUS CURIAE, KITSAP COUNTY,
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Prosecuting Attorney for Kitsap County concurs in the conclusion of Petitioners that the cases of Belgarde v. Suquamish Indian Tribe, et al., 9th Cir., Cause No. 75-3319 and Oliphant v. Suquamish Indian Tribe, et al., 9th Cir., Cause No. 74-2154 involve questions of imperative public importance such as justify the deviation from normal appellate process and require immediate settlement in this Court. See, pages 3 and 4 of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This appeal raises important questions concerning the rights of non-Indian citizens of the United States residing on the Port Madison Reservation in Kitsap County in the State of Washington, to be subject to the lawful jurisdiction of the State of Washington. The interests of Kitsap County in this matter

JOHN C. MERKEL
PROSECUTING ATTORNEY
KITSAP COUNTY
614 DIVISION STREET
PORT ORCHARD, WA 98366
876-7174

arise from its responsibility for the administration and enforcement of State laws in Kitsap County and on the Port Madison Indian Reservation. The Petition for Writ of Certiorari in this cause reveals at page 17, that non-Indians own approximately 4,597 acres of the total 7,275 approximate acres of the Port Madison Indian Reservation (63 percent) in fee simple absolute free of trust restrictions of the United States, and subject to local real estate taxes of the State of Washington. Approximately 2,637 acres remain in individual Indian allotment status (36 percent), with patent held in trust by the United States and exempt from local real estate taxes.

The Petition for Writ of Certiorari further reveals that approximately fifty members of Suquamish Indian Tribe are presently living on the Port Madison Reservation. The total permanent population of non-Indians living on the reservation, in approximately 976 permanent dwellings, paying taxes in Kitsap County, is approximately 2,928 persons. At least 750 of the residents of that reservation have objected to the exercise of tribal jurisdiction over them and have evidenced that objection by signing a petition included as Appendix A. Also included in Appendix A are copies of two letters written by the Kitsap County Board of Commissioners expressing their dissatisfaction with the attempted exercise of jurisdiction by the Suquamish Indian Tribe.

Since there is good cause for this Court to grant a writ of certiorari in this case, see Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at pages 18-28, Kitsap County intends to file a brief amicus curiae in this cause pursuant to United States Supreme Court Rule 42(4).

Respectfully submitted,

JOHN C. MERKEL
Prosecuting Attorney

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

MARK DAVID OLIPHANT and DANIEL B. BELGARDE, Petitioners,	)	NO. 76-5729
V.	)	NOTICE OF APPEARANCE OF AMICUS CURIAE, KITSAP COUNTY
THE SUQUAMISH INDIAN TRIBE, et al, Respondents.	)	

TO: PHILIP P. MALONE, Attorney for Petitioners; GARY D. ERNSTROFF, UNITED STATES DISTRICT ATTORNEY; RICHARD NEELY; and SOLICITOR GENERAL, DEPARTMENT OF JUSTICE, Attorneys for Respondents

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that KITSAP COUNTY appears as amicus curiae in the above-entitled action by its attorney, JOHN C. MERKEL, Prosecuting Attorney in and for Kitsap County, and requests all further pleadings, except original process, in said matter be served upon him at his address stated below.

JOHN C. MERKEL
Kitsap County Prosecuting Attorney
Attorney for Amicus Curiae,
Kitsap County

OFFICE AND POST OFFICE ADDRESS:

JOHN C. MERKEL
Prosecuting Attorney
Kitsap County Courthouse
614 Division Street
Port Orchard, Washington 98366
Telephone: (206) 876-7174

CERTIFICATE OF SERVICE BY MAIL

I, hereby certify that one copy of the foregoing Memorandum of Amicus Curiae, Kitsap County, in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and one copy of the foregoing Notice of Appearance of Amicus Curiae, Kitsap County, were served upon Petitioners and Respondents by depositing the same in the United States mail at the United States Post Office, Port Orchard Main Office, 87 Sidney, Port Orchard, Washington 98366, on the 21st day of December, 1976 addressed to:

Oliphant v. Suquamish Indian Tribe et al., 9th Cir., 1976, Cause No. 74-2154:

1. PETITIONER:

MARK DAVID OLIPHANT, c/o Philip P. Malone, Attorney at Law, 153 1st Avenue, Poulsbo, Wasington 98370

2. RESPONDENTS:

RICHARD BELMONT, JR., Chairman of Council of Suquamish Indian Tribe; DONALD BREAD, Suquamish Tribal Manager; FRED GUARDIPEE, Suquamish Tribal Police Officer; GRACE DUGGAN, Suquamish Tribal Judge; CECILIA HAWK, Suquamish Tribal Judge; c/o Garry D. Ernstroff, Attorney at Law, Ziontz, Pirtle, Morisset, Ernstoff & Chestnut, 600 First Avenue, Seattle, Washington 98104

3. RESPONDENT:

GEORGE M. FELSHAW, Superintendent of the Western Washington Tribal Agency (deceased), c/o United States District Attorney (Western Washington), Federal Courthouse, Seattle, Washington

4. RESPONDENT:

UNITED STATES REGIONAL SOLICITOR'S OFFICE, c/o Richard Neely, Attorney at Law, P.O. Box 3621, Portland, Oregon 97208

Belgarde v. Suquamish Indian Tribe et al, 9th Cir., Cause No. 75-3319:

1. PETITIONER:

DANIEL B. BELGARDE, c/o Philip P. Malone, Attorney at Law, 153 1st Avenue, Poulsbo, Washington 98370

2. RESPONDENTS:

THE SUQUAMISH INDIAN TRIBE: CECILIA M. HAWK, Judge,

Suquamish Indian Tribe; GRACE DUGGAN, Judge, Suquamish Indian Tribe; c/o BARRY D. ERNSTOFF, Attorney at Law, Ziontz, Pirtle, Morisset, Ernstoff & Chestnut, 600 First Avenue, Seattle, Washington 98104

3. RESPONDENT:

ROGERS C. B. MORTON, Secretary of the Interior of the United States, c/o United States District Attorney (Western District), Federal Courthouse, Seattle, Washington, and c/o Richard Neely, Attorney at Law, P.O. Box 3621, Portland, Oregon 97208.

United States or an Officer of Agency thereof as a party. Rule 33:

1. RESPONDENT:

ROGERS C. B. MORTON, Secretary of the Interior of the United States, c/o United States District Attorney (Western Washington), Federal Courthouse, Seattle, Washington, and c/o Richard Neely, Attorney at Law, P.O. Box 3621, Portland, Oregon 97208.

2. RESPONDENT:

Solicitor General, Department of Justice, Washington, D.C. 20530.

DATED this 21st day of December, 1976.

JOHN C. MERKEL
Kitsap County Prosecuting Attorney
Attorney for Amicus Curiae,
Kitsap County

County Commissioners TLD 1477

The present Suquamish Indian Tribal government in Kits. County, Washington, is claiming jurisdiction over the property and persons of all residents living within the original exterior boundaries of the Port Madison Indian Reservation. Therefore the undersigned persons who own property, or reside within those boundaries, petition the President and the Congress of the United States to uphold the validity of our patent, or fee simple lands; and to be relieved of the claims of the present Suquamish Tribal government that all residents in this area are under their jurisdiction and shall be governed by them without representation. These patent lands were originally purchased from Indian allotted lands, and there is nothing in the original abstracts that reserves the right of jurisdiction over the new owners, by the Suquamish Indians.

We respect the Indian right to govern themselves, if that be their wish, but we also ask that our rights be protected by allowing us to maintain our status as citizens of Kitsap County, the State of Washington, and the United States of America. No Tribal government of the Suquamish, until the present one, has insisted on sovereignty rights over the non-Suquamish Indian population.

We therefore, in the interests of the peace and welfare of all citizens living in this area, do petition that the patent lands be deleted from the original boundaries of this reservation, and that this area be recognized for what it presently is: approximately 2600 acres of allotted lands owned by individual Indians and lived on by 50 members of the Suquamish Indian Tribe; approximately 4700 acres of fee simple land lived on by 2928 non-members of the Suquamish Tribe; and 36 acres of tribal land, leased for 50 years to non-Indians.

NAME	ADDRESS	DATE
Arthur Carlson	Box 48 Suquamish, Wn.	2-6-7
Alan R Porter	Box 447 Poulsbo	2/6/7
Ray Haugland	P.O. Box-114 Suquamish	2/6/7
Mary E Haugland	P.O. Box 114 Suquamish	2/6/74
L A Neville	P O 64 Suquamish	2/7/7
Ruby Neville	P O 64 Suquamish	2/7/74
[illegible]	RT 1 Box 110	[illegible]
Ruth Miller	1024 SW Dewey Bremerton	2-7-7
Dale E. Olson	P.O. Box 259 Suquamish	
Albert Olson	Box 8755 Bainbridge Isl. 98110	2-8-

KITSAP COUNTY
614 DIVISION STREET
PORT ORCHARD, WA 98366
AREA CODE 206, TEL. TR 6-4441

BOARD OF COMMISSIONERS
FRANK RANDALL
District 1
WILLIAM H. MAHAN
District 2
GENE LOBE
District 3

August 6, 1974

The President, Richard M. Nixon
The White House
Washington, D.C.

My Dear Mr. President:

Enclosed you will find petitions filed by some 750 persons which constitutes nearly all the permanent residents within the historic boundaries of the Port Madison Indian Reservation.

The Board of Commissioners is acting as forwarding agent for these petitions because of our complete agreement with the concerns and the ideals enunciated on the petitions as well as our concern about the rather tense situation that is developing here in this county. We feel very strongly that if the Indians' objectives were carried out it would constitute a flagrant example of government without representation. There are, according to our records, approximately 50 members of the Port Madison Tribe residing within the historic boundaries (23 of them, incidentally, have signed the enclosed petitions) and to have this small handful of persons acting as a government for some 2,000 non-Indian landowners, none of whom have the right to elect anyone to the Tribal Council or to have any say about their representation would be, we believe, clearly unconstitutional.

We recognize there are many Reservations with many degrees and types of problems but we firmly believe that in this instance what these people are asking for is right and proper.

The delay in forwarding these was brought about by the Board of Commissioners because of some rather delicate negotiations with the Suquamish Tribal Council regarding a sewerage system for the community of Suquamish. The Board did not want to "rock the boat". Those negotiations now have, however, broken down completely and so we are therefore forwarding these petitions on to you.

Copy

Please let us know if we can answer any questions.

Very Sincerely Yours,

KITSAP COUNTY BOARD OF COMMISSIONERS

Gene Lobe

Gene Lobe, Chairman

William H. Mahan

William H. Mahan, Commissioner

Frank Randall

Frank Randall, Commissioner

FR: pb

Enclosures

Copy to:
Senator Magnuson
Senator Jackson
Senator Abourezk
Congressman Meeds
Mrs. Ky Dewar
Mr. Travis Baker
President Gerald Ford 8/28/74

KITSAP COUNTY
614 DIVISION STREET
PORT ORCHARD, WA 98366
AREA CODE 206, TEL. TR 6-4441

BOARD OF COMMISSIONERS
FRANK RANDALL
District 1
WILLIAM H. MAHAN
District 2
GENE LOBE
District 3

August 29, 1975

The President, Gerald Ford
The White House
Washington, D.C.

My Dear Mr. President:

The enclosed letter and copy of petition were sent to you by this office a year ago. At the present time no response has been received. The situation that occasioned the petition has become even more critical with the Federal Court decision last week that the Indian Tribe has concurrent police jurisdiction with the state within the entire historic boundaries of the reservation. Bear in mind that two-thirds of the Indian lands have been sold and are now fee-patent land under non-Indian ownership. The courts of our land seem to be of no help and we firmly believe it will take congressional action to rectify this inequitable situation.

Copies of the entire 750 names are on file in this office. If you desire, we will forward them on to you.

Very sincerely yours,

KITSAP COUNTY BOARD OF COMMISSIONERS

Frank Randall

Frank Randall, Chairman

William H. Mahan

William H. Mahan, Commissioner

Gene Lobe

Gene Lobe, Commissioner

FR:pb

Enclosures
cc: Senator Magnuson, Senator Jackson, Senator Abourezk, Congressman Meeds, Mrs. Ky Dewar, Congressman Joel Pritchard

copy

Supreme Court, U. S.
FILED
AUG 8 1977
MICHAEL RODAK JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
PETITIONERS,

v.

THE SUQUAMISH INDIAN TRIBE, ET AL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 22, 1976

CERTIORARI GRANTED JUNE 13, 1977

APPENDIX

In the Supreme Court of the United States

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CERTIORARI GRANTED JUNE 13, 1977

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MARK DAVID OLIPHANT, PETITIONER

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RELEVANT DOCKET ENTRIES
MARK DAVID OLIPHANT, PETITIONER

Date	Proceedings
1973	
1. Aug. 23	Petition for Writ of Habeas Corpus filed in U.S. District Court for Western District of Washington at Seattle *(Oliphant, Petitioner v. Edward Schlie, Chief of Police of City of Bremerton, Respondent)* Cause No. 511–73C2
2. Aug. 23	Exhibit I of Petition for Writ of Habeas Corpus: Order of Commitment, dated August 19, 1973 by the Suquamish Provisional Court on the Port Madison Indian Reservation *(The Suquamish Indian Tribe, Plaintiff vs. Mark David Oliphant, Defendant)*
3. Aug. 23	Order to Show Cause And Setting Hearing.
4. Sept. 7	Return to Writ Alleging Custody Under Process and Agreement by Edward Schlie, Chief of Police of the City of Bremerton
5. Sept. 7	Annexed Copy of Agreement to Above Return dated June 7, 1973, between City of Bremerton, State of Washington and U.S. Bureau of Indian Affairs for custody of "Indian prisoners"
6. Sept. 7	Annexed Copy of Order of Commitment to above Return dated August 19, 1973 by the Suquamish Provisional Court on the Port Madision Indian Reservation *(Suquamish Indian Tribe, Plaintiff vs. Mark David Oliphant, Defendant)*, Same as 2. hereof
7. Sept. 7	Annexed Copy of Order Releasing Defendant On Personal Recognizance to above Return, dated August 24, 1973 by

	the Suquamish Provisional Court o. the Port Madison Indian Reservation *(Suquamish Indian Tribe, Plaintiff vs. Mark David Oliphant, Defendant)*
8. Sept. 10	Memorandum of Authorities of Amicus Curiae by Suquamish Indian Tribe, et al
9. Sept. 11	Supplement to Petition for Writ of Habeas Corpus naming as Additional Respondents the Suquamish Indian Tribe, et al
10. Sept. 11	Exhibit II to Supplement to Petition for Writ of Habeas Corpus: Agreement of Defendant to Appear for Trial, dated August 24, 1973 by the Suquamish Provisional Court on the Port Madison Indian Reservation *(Suquamish Indian Tribe, Plaintiff vs. Mark David Oliphant, Defendant)*
11. Sept. 11	Exhibit III to Supplement to Petition for Writ of Habeas Corpus: Order Releasing Defendant on Personal Recognizance, dated August 24, 1973, by the Suquamish Provisional Court on the Port Madison Indian Reservation *(Suquamish Indian Tribe, Plaintiff vs. Mark David Oliphant, Defendant)*, Same as 7. hereof
12. Sept. 11	Exhibit IV to Supplement to Petition for Writ of Habeas Corpus with Exhibit I thereof; Copy of Petition for Writ of Habeas Corpus and Exhibit I, Order of Commitment, same as 1. and 2. hereof
13. Sept. 25	Order to Show Cause and Setting Hearing
14. Oct. 26	United States Memorandum of Amicus Curiae
15. Oct. 26	Exhibit 9 to United States Memorandum of Amicus Curiae: The Suquamish Provisional Court on the Port Madison Indian Reservation, Complaint,

	(Suquamish Indian Tribe, Plaintiff vs. Mark David Oliphant, Defendant), for violation of offense of Section 6, Chapter 3 of Suquamish Indian Tribal Law and Order Code
16. Oct. 26	Exhibit 9 to Untied States Memorandum of Amicus Curiae: The Suquamish Provisional Court on the Port Madison Indian Reservation, Complaint, *(Suquamish Indian Tribe, Plaintiff vs. Mark David Oliphant, Defendant)*, for violation of offense of Section 62, Chapter 3 of Suquamish Indian Tribal Law and Order Code
1974	
17. Jan. 14	Additional Memorandum of Authorities of Additional Respondents, with Exhibits
18. Jan. 25	Verification of Richard Belmont, Jr., verifying for additional Respondents matters set forth in 8. and 17. hereof
19. Jan. 25	Affidavit of John B. Benedetto, verifying for additional Respondents documents and instruments comprising Exhibits 1 and 2 of 17. hereof
20. Jan. 25	Exhibit D to Petitioner's Reply Memorandum; Affidavit of Martha F. George
21. Jan. 25	Exhibit E to Petitioner's Reply Memorandum; Affidavit of Robert J. Smiley
22. April 5	Memorandum Opinion of U.S. District Judge Morill E. Sharp
23. April 5	U.S. District Court Judgment
24. April 30	Notice of Appeal
1976	
25. Aug. 24	Opinion, U.S. Court of Appeals for the Ninth Circuit, Cause No. 74–2154
26. Nov. 22	In The Supreme Court of the United States, Petition for A Writ of Certiorari

to the United States Court of Appeals for the Ninth Circuit *(Mark David Oliphant and Daniel B. Belgarde, Petitioners v. The Suquamish Indian Tribe, et al, Respondents)* No. 76–5729

1977

27. June 13 — United States Supreme Court, Order Granting Writ of Certiorari and Leave to Proceed in Forma Pauperis *(Mark David Oliphant and Daniel B. Belgarde, Petitioners v. The Suquamish Indian Tribe, et al, Respondents)* No. 76–5729

RELEVANT DOCKET ENTRIES
DANIEL B. BELGARDE, PETITIONER

1974

28. Nov. 6 — Petition for Writ of Habeas Corpus, United States District Court, Western District of Washington at Seattle *(Daniel B. Belgarde, Petitioner vs. Suquamish Indian Tribe, et al, Respondents,)* Cause No. C74–683S

29. Nov. 6 — Exhibit 1 to Petition for Writ of Habeas Corpus; Map of Port Madison Indian Reservation.

30. Nov. 6 — Exhibit 2 to Petition for Writ of Habeas Corpus; Affidavit of Martha F. George, Same as 20. hereof

31. Nov. 6 — Exhibit 3 of Petition for Writ of Habeas Corpus; Affidavit of Robert J. Smiley, Same as 21. hereof

32. Nov. 6 — Exhibit 4 of Petition for Writ of Habeas Corpus; Suquamish Tribal Court of the Port Madison Indian Reservation; Temporary Order of Commitment dated October 12, 1974 *(Suquamish Indian Tribe, Plaintiff vs. Daniel B. Belgarde, Defendant)*; Violation of Section 44, Chapter III of the Suquamish Tribal Law and Order Code

33. Nov. 6 — Exhibit 5 of Petition for Writ of Habeas Corpus; Suquamish Tribal Court of the Port Madison Indian Reservation; Temporary Order of Commitment dated October 12, 1974 *(Suquamish Indian Tribe, Plaintiff vs. Daniel B. Belgarde, Defendant)*; Violation of Section 59, Chapter III of the Suquamish Tribal Law and Order Code

34. Nov. 6 — Exhibit 6 of Petition for Writ of Habeas Corpus; Agreement between City of Port Angeles and United States Bureau of Indian Affairs dated April 15, 1974

35. Nov. 6 — Exhibit 7 of Petition for Writ of Habeas Corpus; Proclamation by Governor Daniel J. Evans, Governor of Washington dated August 26, 1971

36. Nov. 12 — Order of U.S. District Court Referring Case to U.S. Magistrate

37. Dec. 13 — Order to Show Cause Pursuant to Order to Show Cause

1975

38. Jan. 31 — Return of Suquamish Respondents on Petition for Writ of Habeas Corpus

39. Jan. 31 — Exhibit A to Return: Bureau of Indian Affairs Incident Complaint Reports.

40. Jan. 31 — Exhibit B–1 and B–2 to Return: Affidavit of Charles Deam

41. Jan. 31 — Exhibit B–3 to Return: Indian Children School Census

42. Jan. 31 — Exhibit C to Return: Memorandum Opinion, United States District Court *(Mark David Oliphant, Petitioner vs. Suquamish Indian Tribe, et al, Respondents)*, Same as 22. hereof

43. Jan. 31 — Exhibit D to Return: Notice of Acceptance of Retrocession of Jurisdiction dated April 5, 1972 by United States Secretary of the Interior; Harrison Loesch, Assistant Secretary of the Interior, Federal Register, Vol. 37, No. 72, April 13, 1972

44. Jan. 31 — Exhibit E–1 to Return: Letter from Regional Solicitor to Barry D. Ernstoff dated January 27, 1975

45. Jan. 31 — Exhibit E–2, E–3, E–4 and E–5 to Return: Title Status Report, United States Bureau of Indian Affairs

46. Feb. 5 — Order Setting Hearing

47. Aug. 1 — Report and Recommendation of United States Magistrate

48. Aug. 18 — Order Denying Writ of Habeas Corpus

49. Aug. 22 — Judgment denying Writ of Habeas Corpus

50. Sept. 4 — Notice of Appeal

51. — Stipulation for Order Holding Appeal in Abeyance filed in United States Court of Appeals, Ninth Circuit, dated November 14, 1975

1976

52. Jan. 5 — Order of United States Court of Appeals, Ninth Circuit holding appeal in abeyance pending Court's decision in *Oliphant vs. Schlie*, Court of Appeals Cause No. 74–2154

53. Nov. 22 — In the Supreme Court of the United States, Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit *(Mark David Oliphant and Daniel B. Belgarde, Petitioners v. The Suquamish Indian Tribe, et al, Respondents)* No. 76–5729

1977

54. June 13 — United States Supreme Court, Order Granting Writ of Certiorari and Leave to Proceed in Forma Pauperis *(Mark David Oliphant and Daniel B. Belgarde, Petitioners v. The Suquamish Indian Tribe et al, Respondents)* No. 76–5729, Same as 27. hereof

DISTRICT COURT—PETITION FOR WRIT OF HABEAS CORPUS

File Aug. 23, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
DIVISION NO. 1

MARK DAVID OLIPHANT,
Petitioner,

EDWARD SCHLIE, CHIEF OF POLICE OF THE CITY OF BREMERTON
Respondent.

NO. 511-73C2

PETITION FOR WRIT OF HABEUS CORPUS

TO: THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON:
The petition of JOHN F. RAYMOND respectfully shows:

I.

That MARK DAVID OLIPHANT is now imprisoned and restrained of his liberty by EDWARD SCHLIE, CHIEF OF POLICE OF THE CITY OF BREMERTON in the CITY OF BREMERTON JAIL, BREMERTON, KITSAP COUNTY, WASHINGTON.

II.

That David Mark Oliphant is a non-Indian residing in Kitsap County, Washington.

III.

That the Suquamish Indian Tribe is an Indian Tribe in accordance with the laws of the United States and that its tribal officers purport to have sovereign police power over the persons of non-Indians entering boundaries which they claim are within the PORT MADISON INDIAN RESERVATION.

IV.

That on or about Sunday on the 19th day of August, 1973, at approximately 4:20 o'clock A.M., Mark David Oliphant was seized without his consent and taken under custody by two individuals who were purporting to act as deputy police of the Suquamish Indian Tribe for land owned by the Suquamish Indian Tribe and subject to the trust status of the United States, in Suquamish, Kitsap County, Washington. That he was then forced to walk from that location along a public highway of the State of Washington to the tribal office of the Suquamish Indian Tribe in Suquamish, Kitsap County, Washington, where he was imprisoned against his will by officers purporting to act for, and with the authority of the Suquamish Indian Tribe. He then remained imprisoned in a locked room without food, heat, bed, or toilet facilities, for a period of approximately six (6) hours or more, when he was then forced to appear before two persons claiming to act as judges with judicial power over his person to hear an arraignment on the false arrest previously stated.

On August 19, 1973 he was charged with "assault and battery" before the "Suquamish Tribal Court" without due process of law, and contrary to the laws and constitution of the United States; and an "Order of Commitment" was signed by Grace Duggan, "Judge, Suquamish Tribal Court" and Cecelia M. Hawk, "Judge, Suquamish Tribal Court". A copy of the "Order of Commitment" is attached and made a part hereof as Exhibit I. At the time of his presentment before said Court and during the hearing thereof, no presentation was made by either of the "officers" or other "witnesses" of the incident for which his "arrest" and incarceration was made. The petitioner knows of no laws applicable to the person of the prisoner, Mark David Oliphant, by the Suquamish Indian Tribe or the Suquamish Tribal Court and of no Court of justice therefrom to which he can appeal.

V.

That following the execution by Judge Grace Duggan and Judge Cecelia Hawk, he was handcuffed and taken into custody in an automobile supplied and/or furnished by the United States Government, Bureau of Indian Affairs,

to the Suquamish Indian Tribe, by a tribal officer. He was then transported and committed to the City Jail of Bremerton, Washington, where he now remains unlawfully incarcerated.

VI.

That said restraint, arrest and imprisonment of Mark David Oliphant were false and illegal by said persons and without authority over the person of Mark David Oliphant, a non-Indian, and contrary to all due process of law.

VII.

That no previous application has been made for the writ prayed for below. The petitioner has made this petition as an attorney for Mark David Oliphant, and upon his information and belief from an interview with the prisoner and an investigation of matters herein contained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue, directed to the said respondent, Edward Schlie, commanding him to forthwith release the body of Mark David Oliphant from custody to the personal recognizance of his attorney, John F. Raymond, to await hearing on this matter, and that the respondent, Edward Schlie, be commanded to appear and show cause for such imprisonment and detention before the Court granting said writ and why it should not remain absolute.

DATED: The 22nd day of August, 1973.

PETITIONER:

by: _____
JOHN F. RAYMOND
Attorney for Petitioner

(JURAT OMITTED IN PRINTING)

DISTRICT COURT—EXHIBIT I OF PETITION FOR WRIT OF HABEAS CORPUS ORDER OF COMMITMENT

Filed Aug. 23, 1973

IN THE SUQUAMISH PROVISIONAL COURT ON THE PORT MADISON INDIAN RESERVATION

THE SUQUAMISH INDIAN TRIBE,
Plaintiff,

vs.

MARK DAVID OLIPHANT,
Defendant.

ORDER OF COMMITMENT

On the 19th day of August, 1973, the defendant above named, by reason of disposition of this matter has been this date sentenced and/or fined as follows:

Confined to Bremerton City Jail until date of trial, August 27, 1973 at 7:30PM or until bond is posted. Bond will be $100.00 in each charge:

Bond: $100.00 bond for assault and battery;

$100.00 for resisting lawful arrest.

The defendant is hereby remanded to the custody of the Suquamish Tribal Police in accordance with the commitment order above set forth.

Dated: 19th day of August, 1973.

/s/GRACE DUGGAN, JUDGE
SUQUAMISH TRIBAL COURT
/s/CECELIA M. HAWK, JUDGE
SUQUAMISH TRIBAL COURT

DISTRICT COURT—RETURN TO WRIT ALLEGING CUSTODY UNDER PROCESS AND AGREEMENT BY EDWARD SCHLIE, CHIEF OF POLICE OF THE CITY OF BREMERTON

Filed Sept. 7, 1973

(Caption Omitted in Printing)

To the Honorable Morill E. Sharp, Judge for United States District Court, Western District of Washington at Seattle:

I hereby certify and return that before the coming to me of the annexed order to show cause the said Mark David Oliphant was committed to my custody, and was detained by me until August 24, 1973, by virtue of an order of commitment out of the Suquamish Provisional Court on the Port Madison Indian Reservation of Kitsap County, State of Washington, and by the indorsements made upon said order of commitment and by virtue of an agreement with the United States Bureau of Indian Affairs. A copy of said order of commitment and agreement are annexed hereto and made a part of this return. Said Mark David Oliphant was released on his personal recognizance of August 24, 1973, pursuant to an order from the Suquamish Provisional Court and the indorsement thereon of which a copy of said order is annexed hereto and made a part of this return.

DATED this 7th day of Sept., 1973.

/s/ _____
Edward Schlie, Chief of Police
of the City of Bremerton

DISTRICT COURT—ANNEXED COPY OF AGREEMENT TO RETURN OF WRIT DATED JUNE 7, 1973, BETWEEN CITY OF BREMERTON, STATE OF WASHINGTON AND U.S. BUREAU OF INDIAN AFFAIRS FOR CUSTODY OF "INDIAN PRISONERS"

Filed Sept. 7, 1973

(Caption Omitted in Printing)

United States Department of the Interior
Bureau of Indian Affairs
Portland Area Office
Post Office Box 3785
Portland, Oregon 97208

A G R E E M E N T

THIS AGREEMENT MADE AND ENTERED INTO THIS 7th day of June, 1973, by and between the City of Bremerton, State of Washington, through its duly authorized Commissioners, hereinafter referred to as the Party of the First Part, and the Bureau of Indian Affairs, through its Contracting Officer, hereinafter referred to as the Party of the Second Part, NOW THEREFORE

WITNESSETH, That the Party of the First Part shall care for Indian prisoners placed in the custody of its officers and for and in consideration of this service (which shall include room and board) the Party of the Second Part will make payment to the Party of the First Part at the rate of $5.00 per day for the period beginning July 1, 1973 and ending June 30, 1974.

IT IS UNDERSTOOD AND AGREED That Indian prisoners who have not served their full time will not be released except upon written orders of the Suquamish and Port Gamble Tribal Courts and its officers.

IT IS UNDERSTOOD AND AGREED That prisoners committed to the City of Bremerton Jail will be subject to the same rules and regulations required of other prisoners to observe in said jail.

IT IS UNDERSTOOD AND AGREED That payment will be made for this service at the end of each month upon presentation by the Party of the First Part of a proper invoice to the Bureau of Indian Affairs, Western Washington Agency, 3006 Colby Avenue, Federal Building, Everett, WA 98201.

IT IS FURTHER UNDERSTOOD AND AGREED That this arrangement shall be for the above period with the option to renew subject to availability of funds. This agreement may be terminated by either party upon thirty (30) days written notice to the other. This Agreement may be modified in writing upon mutual consent of both to the contract.

THIS AGREEMENT Is subject to the attached General Provisions.

IN WITNESS HEREOF Both parties have hereunder set their hands as shown below.

THE UNITED STATES OF AMERICA BUREAU OF INDIAN AFFAIRS	Bremerton Police Dept. (Organization)
/s/ (Signature)	/s/ (Signature)
E. La Coursa Name (type or print)	R. Wes Henry Name (type or print)
Area Property & Supply Officer (Title)	Acting Chief of Police (Title)
July 7, 1973 (Date)	July 17, 1973 (Date)

DISTRICT COURT—ANNEXED COPY OF ORDER RELEASING DEFENDANT ON PERSONAL RECOGNIZANCE TO RETURN OF WRIT DATED AUGUST 24, 1973

Filed Sept. 7, 1973

IN THE SUQUAMISH PROVISIONAL COURT ON THE PORT MADISON INDIAN RESERVATION

SUQUAMISH TRIBE, *Plaintiff*, v. MARK OLIPHANT, *Defendant*.

NO. 1973–4

ORDER RELEASING DEFENDANT ON PERSONAL RECOGNIZANCE

It appearing to the court that the Defendant agrees to appear for his trial on September 25, 1973 at 6:00 p.m. and that defendant has family ties in the Community of Suquamish on the Port Madison Indian Reservation; it is hereby ordered that defendant is released on his own personal recognizance until the time and date of trial set out above. Place of court will be the Suquamish Tribal Business Office in downtown Suquamish, Washington.

If defendant fails to appear at his trial, a warrant for his arrest will be issued.

Dated this 24th day of August, 1973.

Cecelia Hawk, Judge
Suquamish Tribal Court

DISTRICT COURT—MEMORANDUM OF AUTHORITIES OF AMICUS CURIAE BY SUQUAMISH INDIAN TRIBE

Filed Sept. 10, 1973

(Caption Omitted in Printing)

This is a Habeas Corpus action brought by the defendant in a criminal case before the Suquamish Indian Tribal Court against the Chief of Police of the City of Bremerton who was holding the petitioner in custody by order of the Suquamish Tribal Court and pursuant to an agreement entered into with the City of Bremerton on June 7, 1972. Petitioner in this case was placed under arrest for assaulting a tribal police officer and resisting arrest when the tribal deputies attempted to break up a fight on the Suquamish Tribal Camp Grounds on the Port Madison Indian Reservation.

1. *An Indian Tribe Has the Inherent Sovereign Power to Administer Justice on its Reservation.*

Prerequisite to a proper determination of this case is a preliminary consideration of the basic nature of the Suquamish Indian Tribe as a political entity. The original sovereign status of Indian tribes is explicated at length in *Federal Indian Law*, 1958 (1966 Printing by Assoc. on American Indian Affairs, Inc., N.Y.):

> "Indian self-government includes generally the power of an Indian tribe, to the extent that it has not been limited by Federal law, to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice. Originally, those powers which were exercised by an Indian tribe were not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited dependent sovereignty which had not been extinguished by Federal action. Each Indian tribe began its relationship with the Federal government as a sovereign or quasi-sovereign government, recognized as such by treaty and in legislation. These powers of sovereignty have been limited from time to time by special treaty provisions and laws designed to take from the Indian tribes control of matters which, in the judgment

> of Congress, should be exercised elsewhere." *Federal Indian Law* at 395.

In a discussion of case law regarding the recognition of the sovereign rights of an Indian tribe, it is stated further:

> "The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government." *Federal Indian Law* at 398.

These concepts of sovereignty were recognized in a case which was the foundation for the development of basic principles of Indian law in the United States, *Worcester v. Georgia*, 31 U.S. 515 (1833). Chief Justice Marshall, writing for the Supreme Court stated:

> "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistable power. . . ." 31 U.S. at 559. See also, *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831).

For a number of years many of these inherent sovereign powers of Indian tribes were not exercised as the United States government began to take a firm grasp of the administration of Indian affairs. In 1934 the Indian Reorganization Act was passed (48 Stat. 984) which attempted to revitalize the self-government of Indian tribes. In an opinion as to what powers had been vested in an Indian tribe by existing law, the Solicitor of the Department of Interior issued an extensive opinion on Indian tribal powers. *Powers of Indian Tribes*, 55 I.D. 14 (October 25, 1934). In discussing the power to administer justice on the Reservation, the Solicitor held:

> "So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.
> "It is clear that the original criminal jurisdiction of the Indian tribes has never been transferred to the States. Sporadic attempts of the States to exercise jurisdiction over offenses between Indians, or between Indians and whites, committed on an Indian reservation, have been held invalid usurpation of authority. 55 I.D. at 57.

Where there were no tribal court mechanisms for the administration of justice on the reservation, the Bureau of Indian Affairs established courts of Indian offenses with federally appointed Indian judges. However, these courts sit only where the tribe has not seen fit to administer its own court system. This concept is supported by the 1934 Solicitor's opinion:

> "Whichever of these explanations be offered for the existence of the Courts of Indian Offenses, their establishment cannot be held to have destroyed or limited the powers vested by existing law in the Indian tribes over the province of law and order and the administration of civil and criminal justice. 55 I.D. 64.

The Suquamish Indian Tribe of the Port Madison Reservation has retained full control over the tribal administration of justice on the Reservation. An extensive and comprehensive Law and Order Code was adopted by the tribe at a meeting of the full membership of the tribe. A copy of the Code is attached to this Memorandum as Appendix A. When petitioner in this case was arrested by the tribal police officers, he was brought before the Suquamish Tribal Court which issued on Order of Commitment confining petitioner to the Bremerton City Jail until his trial and setting a bail of $100.00 on each of the two charges. Petitioner refused to put up bail or to pledge tangible property in lieu of bail. On August 24, 1973, petitioner was released on his own personal recognizance upon order of the Suquamish Tribal Court and trial was set for September 25, 1973. A

copy of the pleadings in the Tribal Court file is attached hereto as Appendix B.

2. *The Suquamish Tribal Court Has Jurisdiction to Administer Justice Regarding all Matters Taking Place on Reservation Lands.*

It is a principle of Indian law that for Congress to take away from an Indian tribe any of its sovereign inherent powers, it must do so expressly. Congress, thus far, has not deprived Indian Tribal Courts of jurisdiction except as to certain "major crimes" for which jurisdiction is given to Federal Courts.

In *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *Appeal Dismissed*, 203 U.S. 599, the right of the Creek Nation to enforce a permit tax against non-Indiand was upheld. The 8th Circuit stated:

> "It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it has taken from it. . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek Tribe itself. 135 Fed. at 950.

The 8th Circuit went on to find that the power to tax still existed in the Oglala Sioux Tribe since it was an original "precept of tribal sovereignty" and had not been "pretermitted by any federal statute or agency ruling thereunder."

This concept was reaffirmed in *Williams v. Lee*, 358 U.S. 217 (1959). In that case the Supreme Court held that jurisdiction over a civil suit between a non-Indian and an Indian was rightfully in tribal court and not in state court, citing *Worcester v. Georgia, supra*. The court acknowledged that state courts have been allowed to try non-Indians who committed crimes against each other on a reservation,

> "But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remainded exclusive." 358 U.S. at 220.

The court relied on the fact that the Navajo Tribe had in recent years greatly improved its legal system through increased expenditures and better trained personnel. It went on to find:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. (Citations omitted). The cases in this Court have consistently guarded the authority of Indian governments over their Reservations. Congress recognized this authority in the Navajos in the Treaty of 1968, and has done so ever since. If this power is to be taken away from, it is for Congress to do it." 358 U.S. at 223.

The principles of *Williams v. Lee, supra*, have been upheld recently in *McClanahan v. State Tax Commission of Arizona*, 36 L.Ed. 2d 129, 135 (March 27, 1973).

In *Quechan Tribe v. Rowe*, 350 F.Supp. 106 (S.D. Cal. 1972), the District Court held that the actions of the tribal law enforcement officer in enforcing tribal hunting laws against three non-Indian trespassers on the Reservation were lawful and not subject to interference by the state. That case is now on appeal to the Ninth Circuit Court of Appeals. The decision in that case recognizes Indians' right to enforce tribal ordinances against non-Indians.

A number of legal theories and policy arguments may be advanced in support of the jurisdiction of tribal courts over offenses committed by all persons on a Reservation. Among these theories and arguments are:

(1) A Tribe's power to exclude nonmembers from the Reservation implies a power to subject nonmembers who entered the Reservation to the jurisdiction of its courts.

(2) "Implied consent" and other related bases of personal jurisdiction over absent defendants used to uphold state "long-arm statutes" serve as an adequate doctrinal base.

(3) Title II of the Indian Civil Rights Act of 1968 protects non-Indians' constitutional rights from infringement by tribal courts.

(4) Upholding this type of jurisdiction would strengthen tribal sovereignty, in keeping with expressed congressional policy.

(5) If the tribal right to administer justice on the Reservation is denied, this would create a vacuum in law enforcement on the Reservation.

A. *Power to Exclude.*

The power of an Indian tribe to exclude nonmembers of the tribe from entering upon the Reservation was first clearly formulated in an opinion of the Attorney General rendered in 1821 with respect to the lands of the Seneca Indians:

> "So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent." 1 Op.Atty Gen. 465, 466.

In *Dodge v. Nakai*, 298 F.Supp. 17 (D. Ariz. 1968) and 298 F.Supp. 26 (D. Ariz. 1969), the Court held that the power to exclude nonmembers from the Navajo Reservation was reserved to the Navajo Tribe because the Navajo Reservation was set aside for "use and occupation" of the Navajo Tribe and because of language in the Navajo Treaty to the effect that no persons except those authorized should be permitted to pass over, settle upon, or reside in the area of the Reservation. The Court went on to find that the Indian Civil Rights Act demanded that a nonmember be given due process before he is excluded from the Reservation.

The *Treaty with the Suquamish*, January 22, 1855 (12 Stat. 927) granted the Port Madison Reservation to the Suquamish Indians also for their "use and occupation." In addition, in Article II of the Treaty, it was stated:

> "All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of said Tribes or bands, and of the Superintendent or agent. . . ."

The right to exclude necessarily includes the right to determine conditions upon which nonmembers shall enter the Reservation. 55 I.D. 14, 50. Conditions of entry must be consistent with federal law, but since no federal law prohibits jurisdiction of tribal courts over non-Indians accused of minor offenses, it follows that a condition for entry for nonmembers is submission to tribal court jurisdiction.

B. *Doctrine of "Implied Consent."*

Notices have been placed in prominent positions at the entrances to the Port Madison Indian Reservation to the effect that entry onto the Reservation lands will be deemed implied consent to submission to the jurisdiction of the Suquamish Tribal Court.

Implied consent is one of many doctrines used to uphold the so-called "long-arm" statutes in effect in almost every

state. This anology becomes clear if a criminal charge is thought of as an alleged tort against the Tribe.

An examination of the factors to be considered when determining the propriety of "long-arm" jurisdiction shows the fairness of the exercise of jurisdiction by the Suquamish Indian Tribe over nonmembers committing crimes on the Reservation. The inconvenience to the defendant in having to defend in a foreign jurisdiction is to be weighed against the interest of the plaintiff, i.e. the Tribe, in suing locally. In any case, the defendant will not be resident a great distance from the Reservation. In the instant case the defendant was actually a resident of the Reservation. In the case of the Suquamish, experience shows that the Tribal Court is the only forum where the Tribe is likely to get relief. The interest of the plaintiff Tribe is compelling.

In view of the fact that the defendant in this case resides on the Reservation and committed his offense against the tribal law enforcement officer on traditional Suquamish encampment grounds under the standards traditionally established for state "long-arm" jurisdiction, the Suquamish Tribe is not asserting jurisdiction that offends "traditional notions of fair play and substantial justice." *Millikan v. Meyer*, 311 U.S. 457, 463 (1940).

C. *The Indian Civil Rights Act Will Protect the Constitutional Rights of Non-Indian Defendants.*

Until the passage of the 1968 Indian Civil Rights Act, the judicial authority of an Indian Tribe was not subject to constitutional civil rights limitations. *Talton v. Mayes*, 163 U.S. 376 (1896). The 1968 Act extended a modified version of the first and fourth through eighth amendments to Indian Tribes and limited penalties to imprisonment for a term of six months or a fine of $500.00. (P.L. 90—284, 82 Stat. 77, 25 U.S.C. §1302).

The legislative history of the Indian Civil Rights Act, explicated in *Dodge v. Nakai, supra*, clearly shows that Congress understood that tribal courts would exercise jurisdiction over non-Indians as well as Indians:

> "Defendants contend that it was the intent of Congress in enacting Title II [25 U.S.C. §1302] to protect only the rights of Indians in their relationships with tribal governments, and that plaintiff Mitchell, a non-Indian, is not entitled to invoke the protection provided by that legislation. Defendants contend that the term 'any person' where it appears in Title II, should be interpreted

> as meaning 'any American Indian.' The legislative history of Title II does not provide this court with a justifiable reason for so restricting the plain language of the statute. . .
> In May, 1966, the Department of the Interior submitted supplemental testimony and a revision of the substitute bill that was *intended to establish rights for all persons who may be subject to the jurisdiction of tribal governments whether Indians or non-Indians*. See Summary Report on the Constitutional Rights of American Indians of the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 2d Sess., at 9-10 (1966). At this point, along with immaterial changes the term 'any person' was substituted for the term 'American Indian' throughout the bill that eventually became Title II. That language remained in the bill up to and including the time of its enactment into law." (Emphasis added)

Therefore, "any person" is guaranteed substantially the same rights under tribal jurisdiction as he would be under state and federal jurisdictions.

Thus, there is no argument that a Tribal Court having jurisdiction over offenses committed by non-Indians would result in the denial of constitutional protections to non-Indians in Tribal Courts. Congress clearly intended that these constitutional protections should be available for non-Indians in Tribal Courts and the procedures of the Suquamish Tribal Court are evidence of the intention by the Court and the Tribe to allow full Civil Rights protections ordered by federal law.

D. *Congressional and Executive Policy Regarding Tribal Sovereignty.*

The attitude of Congress toward the concept of tribal sovereignty has changed drastically over the years. The General Allotment Act of 1887 (24 Stat. 388) was clearly an attempt to dismantle tribal governments and Indian communities and provide for the assimilation of Indians into the dominant society. A major reversal of this governmental policy and approach toward Indian affairs was effectuated by the Indian Reorganization Act of 1934. The purpose of that Act was to resurrect and revitalize concepts of Indian sovereignty and procedures of self government. The 1968 Indian Civil Rights Act by recognizing power of self government of Indian Tribes as including executive, legislative and judicial functions also reaffirms the congressional policy

to afford to Indian Tribes the right to regulate conduct within their Reservations as sovereign government bodies.

There has also been a change in executive policy towards the strengthening of tribal sovereignty and tribal institutions. In a message to Congress dated July 8, 1970, H.R. Doc. No. 90-363, 91st Congress, 2d Session (1970), President Nixon stated:

> "This, then, must be the goal of any new national policy toward the Indian people: To strengthen the Indian's sense of autonomy without threatening his sense of community."

The President then went on and recommended a number of changes in executive policy which would have the result of transferring to Indian tribes many of the functions theretofore performed by the federal government and of encouraging greater development by tribes of their Reservations.

In furtherance of these congressional and executive policies regarding the strengthening of tribal government, assertion of jurisdiction by tribal courts over offenses committed by anyone on a Reservation would protect the Reservation from outside intruders and increase the status of tribal government in the eyes of tribal members.

E. *Law Enforcement Vacuum.*

As a practical matter, jurisdiction of a tribal court over offenses committed by all persons on the Reservation is necessary for the carrying out of an effective law enforcement program on the Reservation. The instant case clearly proves this point. When the Suquamish Indian Tribe planned their annual Chief Seattle Days celebration, the Tribe knew that thousands of people would be congregating in a small area near the tribal traditional encampment grounds for the celebration. A request was made of Kitsap County to provide law enforcement assistance. One deputy was available for approximately one 8-hour period during the entire weekend. The tribe also requested law enforcement assistance from the Bureau of Indian Affairs, Western Washington Agency. They were told that they would have to provide their own law enforcement out of tribal funds and with tribal personnel.

Petitioner in this case was arrested at approximately 4:30 a.m. The only law enforcement officers available to deal with the situation were tribal deputies. Without the exercise of jurisdiction by the Tribe and its courts, there could

have been no law enforcement whatsoever on the Reservation during this major gathering which clearly created a potentially dangerous situation with regard to law enforcement. Public safety is an underpinning of a political entity. If tribal members cannot protect themselves from offenders, there will be powerful motivation for such tribal members to leave the Reservation.

The attitude of the Bureau of Indian Affairs is that in view of established congressional and executive policies toward Indian self government, Tribes should exercise law enforcement jurisdiction and deal with law enforcement problems on their own. It would be deceptive of the United States government to provide for tribal law enforcement and deny to the Tribes federal law enforcement, only to have the courts refuse to allow tribal courts to assert jurisdiction over offenses committed by any persons on Reservations.

3. *Conclusion.*

In view of the judicial principle that governmental powers of Indian tribes are retained unless and until expressly withdrawn by Congress, it is evident that Indian tribal courts have jurisdiction over offenses committed by any persons on a Reservation. In balancing the benefit to Tribes in being able to enforce this jurisdiction with the burdens to be borne by non-Indian defendants before tribal courts, the need for the assertion of tribal jurisdiction becomes evident.

> "The historical limitations on both *in personam* and *in rem* jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. . . . Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon the somewhat medieval concepts of presence and power." *Simpson v. Lochman*, 21 N.Y. 2d 305, 234 N.E. 2d 669 (1967).

The factual analysis of this case, the legal analysis of the powers of Indian tribes, and a review of the policies of the federal government toward Indian tribes all point to the need for this Court to reaffirm the inherent right of the Suquamish Indian Tribe to maintain an orderly community by regulating the conduct of those who choose to enter it.

DATED this 10th day of September, 1973.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET & ERNSTOFF

BY _____
BARRY D. ERNSTOFF, of Attorneys for Amicus

DISTRICT COURT—SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Filed Sept. 11, 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MARK DAVID OLIPHANT, *Petitioner*, *vs.* EDWARD SCHLIE, CHIEF OF POLICE OF THE CITY OF BREMERTON, *Respondent*, and Additional Respondents: THE SUQUAMISH INDIAN TRIBE—RICHARD BELMONT, JR., CHAIRMAN OF COUNCIL OF SUQUAMISH INDIAN TRIBE; DONALD BREAD, SUQUAMISH TRIBAL MANAGER; FRED GUARDIPEE, SUQUAMISH TRIBAL POLICE OFFICER; GRACE DUGAN, SUQUAMISH TRIBAL JUDGE; and CECILIA HAWK, SUQUAMISH TRIBAL JUDGE; and GEORGE M. FELSHAW, SUPERINTENDANT OF THE WESTERN WASHINGTON TRIBAL AGENCY,	NO. 511—73C2 SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS

TO: THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON:

I.

There are added as additional respondents the above-named "Additional Respondents".

II.

That the Suquamish Indian Tribe is an Indian Tribe recognized by the laws of the United States as an Indian Tribe, whose Indian members in the distant past occupied

as a tribal community certain Indian lands upon a reservation known as the "Port Madison Indian Reservation". That the original boundaries of Port Madison Indian Reservation were established by a treaty between the United States and the Dwamish, Suquamish, and other Allied and Subordinate Tribes in Washington Territory on January 22, 1844 and ratified on April 11, 1859. That since that time the lands within those boundaries were settled by non-Indians; the members of the Suquamish Indian Tribe were compensated for those lands and the tribal community thereon terminated.

III.

That the Suquamish Indian Tribe now claims sovereignty of governmental civil and criminal jurisdiction over lands claimed to be within the boundaries of the Port Madison Reservation. That the Suquamish Indian Tribe and/or its members ceased to occupy any of the lands as a tribal community and ceased to maintain any customs, government, culture, regulations and/or authority over those lands and persons therein claimed to be within the present boundaries of the Port Madison Indian Reservation prior to the year of 1965, at which time it received recognization from the United States Government as an Indian Tribe and a Constitution and By-Laws were adopted.

IV.

That at the time in 1965 that the government of the Suquamish Indian Tribe was recognized by the United States Government, the land within the boundaries claimed by the Suquamish Indian Tribe was not occupied by the Suquamish Indian Tribe and/or its members as a tribal community, and there were no tribal customs, laws, rules and/or regulations adopted by its members for either the exercise of criminal and/or civil jurisdiction over persons within that area.

V.

That the governmental powers of the Suquamish Indian Tribe are vested in the Suquamish Tribal Council. That in 1965 the lands claimed to be within the Port Madison In-

dian Reservation consisted of approximately eight thousand (8,000) acres, of which only approximately forty-one (41) acres of Indian Tribal community land, which was and ever since that time has been unoccupied by the Suquamish Indian Tribe and/or its members. In the year 1969, approximately thirty-six (36) acres of the unoccupied tribal lands were leased by the Suquamish Indian Tribe for a term of fifty (50) years to Chief Seattle Properties, Inc., a Washington corporation, leaving a balance of approximately four (4) acres that is occupied by the terms of a lease with the American Legion, a baseball park and a graveyard. The remainder of the lands within the claimed boundaries of the Port Madison Reservation consist of roads and rights-of-way of public highways of the State of Washington; allotted lands belonging to Indians subject to the jurisdiction of the United States; and lands owned by non-Indians not subject to the jurisdiction of the United States. In the approximate eight thousand (8,000) acres claimed to be within the boundaries of the Port Madison Indian Reservation, there are approximately two thousand six hundred thirty eight (2,638) acres owned as allotted Indian lands subject to trust status and the jurisdiction of the United States, and approximately five thousand three hundred twenty one (5,321) acres that are owned by non-Indians and not subject to the trust status and jurisdiction and control of the United States. Thus, there is approximately 33-1/3% "Indian land" and approximately 67% non-Indian land within the claimed boundaries of the Port Madison Indian Reservation.

VI.

The land within the boundaries claimed by the Respondents to be the Port Madison Indian Reservation has not been occupied by any Indian tribal community of the Suquamish Indian Tribe for some unknown time in the past. The area has been occupied largely by non-Indians before and since 1930, and consists of a community of non-Indians residing in the area within an unincorporated area known as the Town of Suquamish, Kitsap County, Washington. The Town of Suquamish is occupied by non-Indians owning commercial and residential property zoned under the laws of Kitsap County and over whom there is criminal and civil jurisdiction of Kitsap County, State of

Washington. The area has been and now is occupied by approximately 1500 to 2500 non-Indian citizens of the United States and residents of the State of Washington. The area has been and now is occupied by a minority of Indians living on lands which are not under or subject to the jurisdiction and control of the United States and on allotted lands that are Indian lands subject to the jurisdiction and control of the United States. At the present time the Indian population occupying those lands within the claimed boundaries of the Suquamish Indian Reservation who are enrolled members of the Suquamish Indian Tribe is approximately forty-three (43) in number, consisting of approximately nineteen (19) adult members and approximately twenty-four (24) minors.

VII.

In January, 1973, the respondent, Richard Belmont, Jr., and other individuals were appointed members of the Tribal Council of the Suquamish Indian Tribe, and said respondent was appointed Chairman thereof. That on that date and ever since that time, said individual has been acting in that capacity under the authority of the Suquamish Indian Tribe and recognized by the United States Government, Department of Interior, Bureau of Indian Affairs.

VIII.

That the United States Government, Department of Interior, Bureau of Indian Affairs, on or about December 24, 1957, as appears in 22 F.R. 10515, and now contained in Code of Federal Regulations, Title 25-Indians, Subchapter B-Law and Order, passed regulations for the exercise of sovereign authority by Indian Tribal governments and establishing a Code of Indian Tribal Offenses. That in accordance with said regulations, in Section 11.301 thereof, the Superintendent of each Indian reservation is Commander of the Indian Police Force and generally responsible for the general efficiency and conduct of the members thereof. That the respondent George Felshaw at all times hereinafter mentioned is and was responsible as Superintendent of the Port Madison Indian Reservation for the conduct of the police officers hereinafter stated.

IX.

The Petitioner hereby incorporates the allegations stated in the Petition for Writ of Habeas Corpus and in addition thereto alleges as follows:

1. That while the Petitioner was incarcerated in the City of Bremerton Jail under the custody and control of the Respondent, Edward Schlie, Chief of Police of the City of Bremerton, persons unknown to the Petitioner, as police officers of the City of Bremerton, allowed Donald Bread and Fred Guardipee into the presence of the Petitioner and while he was being incarcerated, Donald Bread and Fred Guardipee requested that he deliver title and transfer possession of his automobile to them in exchange for his release from confinement from the City of Bremerton Jail. This the Petitioner refused to do. Previously to that time and place, while the Petitioner was confined in the City of Bremerton Jail, and unknown to him and without authority from him, Donald Bread and Fred Guardipee on the 22nd day of August, 1973 did see the wife of the Petitioner in the community of Suquamish, Kitsap County, Washington, and made the same request, which she refused.

2. That on the 23rd day of August, 1973, the Court made and entered an Order to Show Cause and Setting Hearing, returnable on August 24, 1973, by the Respondent, Edward Schlie, Chief of Police of the City of Bremerton, and to which he has not answered as of the date hereof, September 10, 1973.

3. That on the date of August 24, 1973, when the Order to Show Cause and Setting Hearing by the Court was returnable by the Respondent, Edward Schlie, Chief of Police of the City of Bremerton, Edward Schlie did cause the custody of the Petitioner to be transferred to Fred Guardipee in the forenoon of August 24, 1973, in the City Jail at Bremerton. At that time and place, and for the release of the Petitioner from imprisonment in the City of Bremerton Jail, police offices of the City of Bremerton, unknown to the Petitioner and acting within the authority, direction and control of Edward Schlie, together with Fred Guardipee, the Suquamish tribal police officer, did require the custody and control of the Petitioner to be released to Fred Guardipee in exchange for his release from imprisonment in the City of Bremerton Jail. Fred Guar-

dipee then required the Petitioner to sign an "Agreement of Defendant to Appear for Trial", a copy of which is attached and made a part hereof as the Petitioner's Exhibit II. Fred Guardipee, the Suquamish tribal police officer, did then deliver to the Petitioner an "Order Releasing Defendant on Personal Recognizance" signed by "Cecelia Hawk, Judge Suquamish Tribal Court" of the "Suquamish Provisional Court on Port Madison Indian Reservation", dated August 24, 1973, a copy of which is attached and made a part hereof as Petitioner's Exhibit III.

4. The additional defendants, Grace Dugan, Suquamish Tribal Judge; Cecelia Hawk, Suquamish Tribal Judge; Don Bread, Suquamish Tribal Manager; and Fred Guardipee, acting individually and/or in concert with the Chief of Police of Bremerton, at the time, times and places set forth in the Petition for Writ of Habeas Corpus and this supplement, have caused the personal liberty of the Petitioner to be detained, restrained and imprisoned in the past, and claim authority over his person to do so in the future, as a continuous event from the date of his "arrest" on August 19, 1973 to the present time. Cecelia Hawk, Suquamish Tribal Judge, and Fred Guardipee, Suquamish Tribal Police officer, claim authority over the person of the Petitioner whereby his release from imprisonment in the City of Bremerton Jail was exchanged for restraint on his liberty by being made to appear before the Suquamish Tribal Court on the 25th day of September, 1973, in accordance with Exhibit III hereof.

5. The respondents, George M. Felshaw, Superintendent of the Port Madison Indian Reservation and Commander of the Suquamish Tribal Police Force; Richard Belmont, Jr., Chairman of the Tribal Council of the Suquamish Indian Tribe; Donald Bread, Suquamish Tribal Manager; Fred Guardipee, Suquamish Tribal Police Officer; Grace Dugan, Suquamish Tribal Judge; and Cecelia Hawk, Suquamish Tribal Judge, acting individually and/or in concert with the respondent, Edward Schlie, Chief of Police of the City of Bremerton, and other unknown persons acting as deputy police officers of the Suquamish Indian Tribe, at the times and places set forth in the Petition for Writ of Habeas Corpus and this supplement, have caused the personal liberty of the Petitioner to be detained, restrained, and imprisoned and subject to the claimed sovereign authority of the Suquamish Indian

Tribe, its police officers, court and authority, and claim authority over his person to do so in the future, as a continuous event from the date of his false arrest on August 19, 1973 to the present time. Said respondents of the Suquamish Indian Tribe, individually and in concert together, have held the Petitioner in unlawful imprisonment, demanded money from him which they have no authority to receive, and have subjected him to cruel punishment and treatment. The Suquamish Indian Tribe, acting through its Tribal Chairman, Richard Belmont, Jr.; Cecelia Hawk, Tribal Judge; Fred Guardipee, Tribal Police Officer, for whom the respondent, George M. Felshaw, is responsible, claim authority over the person of the Petitioner whereby his release from imprisonment in the City of Bremerton Jail was exchanged for restraint on his liberty by being made to appear before the Suquamish Tribal Court on the 25th day of September, 1973 in accordance with Exhibit III hereof. A copy of the Petition for Writ of Habeas Corpus on file herein is attached and made a part of this supplement as Exhibit IV hereof.

X.

The Suquamish Indian Tribe and the individual respondents above-stated are acting in violation of the law of the United States, the State of Washington, and any tribal laws of the Suquamish Indian Tribe in the following particulars:

1. The sovereignty of the Suquamish Indian Tribe to govern, pass, or adopt laws promulgated by the United States, Department of Interior, Bureau of Interior Affairs, and/or its own customs, whereby it has police officers and a tribal court with judges, with criminal jurisdiction of a territorial nature over persons not members of the Suquamish Indian Tribe has never existed and does not now exist;

2. The passage of laws by the Suquamish Indian Tribe and/or the Suquamish Tribal Council, the establishment of the Suquamish Tribal Council and the orders of the Suquamish Tribal Court, and the actions of its police officers that relate to the conduct of the Petitioner, a non-Indian, herein alleged, are not law, or laws within the meaning of the United States Constitution. Therefore, the application thereof by the respondents herein-stated are in

violation of the laws of the United States, and the Constitution of the United States, in accordance with the following articles thereof, where the rights of the Petitioner are set forth:

a) Amendment IV—Searches and seizures
b) Amendment V—Due process; just compensation for property
c) Amendment VI—Jury trial for crimes; and procedural rights
d) Amendment XIV—Citizenship rights not to be abridged by States.

XI.

The Suquamish Indian Tribe and/or the individual respondents above-stated are acting in violation of the laws of the United States set forth in Chapter 15—Constitutional Rights of Indians, Pub. L. 90-284, 25 USCA, Sections 1301, 1302 of Subchapter I, and Subchapter II, Section 1311, by color of authority thereof and contrary thereto, as alleged in the Petition for Writ of Habeas Corpus and this supplement, in the following particulars:

1. That upon information and belief of the Petitioner, the purported laws claimed by the Respondents to have been violated by the Petitioner were never authorized and passed by due process of law in accordance with the Constitution of the United States, or in accordance with any Tribal Constitution or customs of the Suquamish Tribal Community.

2. That the Respondents, Grace Dugan and Cecelia Hawk, as Judges; and Fred Guardipee, as Police Officer, have had little or no training in the process of law to protect the constitutional rights of a citizen of the United States in the application and enforcement of the law to which they claim authority in applying to the Petitioner, and that their administration of "justice" in either the arrest and trial of the Petitioner is without any safeguards in procedure or training in accordance with due process of law to which the Petitioner is entitled in the protection of his liberty and freedom by the Constitution of the United States.

3. That Fred Guardipee is not a police officer of the law; the Suquamish Tribe Provisional Court is not a tribunal of law; and Cecelia Hawk and Grace Dugan are not judges or justices of the law; and the law which they claim to enforce

is not law within the meaning of the equal protection clause of the 5th Amendment of the Constitution of the United States and the 14th Amendment thereof, but is an arbitrary abuse of power by the taking into their own hands of the color of the law of the United States to which they are neither authorized or entitled.

XII.

Because of the foregoing facts alleged in the Petition for Habeas Corpus and this supplement thereto, the Petitioner has been, and shall continue to be, restrained of his liberty by the Respondents named herein, contrary to the Constitution of the United States and by purported orders of the Suquamish Indian Tribe.

XIII.

That the Respondents, Grace Dugan, Suquamish Tribal Judge; Cecelia Hawk, Suquamish Tribal Judge; Fred Guardipee, Suquamish Tribal Officer; Donald Bread, Suquamish Tribal Manager; Richard Belmont, Jr., Chairman of the Suquamish Indian Tribe Council; and George M. Felshaw, Superintendent of the Western Washington Tribal Agencies, acting under the color of the law of the Suquamish Indian Tribe and/or acting in its behalf, have in concert, or separately by themselves or their agents, violated the Constitutional rights of the Petitioner as provided in 25 USCA, 1302 (Constitutional Rights) in the following particulars:

1) Restrained and imprisoned the Petitioner after an unlawful arrest for charge of an offense over which as to the person of the Petitioner they had no jurisdiction and did thereby violate the right of the Petitioner to be secure in his person and property against unreasonable seizure;
2) Did incarcerate the person of the Petitioner in a room without food, heat or toilet facilities for a period of six hours, or more, on August 19, 1973, and by the display of armed force and the manner of confinement at the Tribal Office of the Suquamish Indian Tribe did inflict cruel and unusual punishment upon the Petitioner;
3) Did deny the person of the Petitioner the right to be informed of the nature and cause of the accusation against him, and to be confronted with the witnesses against him at the time of his sentencing to the City

of Bremerton Jail in accordance with the due process of the law to him applicable;

4) Deprived the person of the Petitioner of his liberty without due process of the law of the jurisdiction applicable to the person of the Petitioner.

WHEREFORE, in accordance with P.O. 90-284, Title 11, Section 203, dated April 11, 1968, of the United States (25 USCA 1303), the Petitioner requests the privilege of the Writ of Habeas Corpus, to test the legality of the arrest, restraint and detention by each of the Respondents, acting individually or in concert together.

Therefore, the Petitioner requests as provided by law from the allegations stated in the Petition for Writ of Habeas Corpus and Supplement thereto, that the Court, in accordance with 28 USCA Section 2243 (Issuance of Writ; Return; Hearing; Decision) issue an Order to Show Cause directed to each of the Respondents: Edward Schlie, Chief of Police of the City of Bremerton; Donald Bread, Suquamish Tribal Manager; Fred Guardipee, Suquamish Tribal Police Officer; Grace Dugan, Judge of the Suquamish Tribal Court; Cecelia Hawk, Judge of the Suquamish Tribal Court; Richard Belmont, Jr. Chairman of the Suquamish Tribal Council; and George M. Felshaw, Superintendent of the Western Washington Tribal Agencies, to show cause why a Writ of Habeas Corpus should not issue to dispose of the matter by releasing the Petitioner from the acts of detention and restraint against his liberty which the Petitioner has alleged, or as a matter as the Court may determine that law and justice require, after the return date and hearing has been held as the Court may determine.

The Petitioner further requests that the Order to Show Cause require the Respondents to return an answer to each of the allegations contained in the Petition for Writ of Habeas Corpus and this supplement thereto, by a date certain not less than twenty (20) days from the date said Order to Show Cause is issued, or the allegations contained therein shall be deemed to be true and correct by the Court, and that a copy of the Petition for Writ of Habeas Corpus, Supplement to the Petition for Writ of Habeas Corpus, and Order to Show Cause be served by the United States Marshall on each of the Respondents as provided by law. After the return date to the Order to Show Cause, the Petitioner requests, as the Court may determine, that either hearings be held for a determination by the Court as

to the necessary facts or law, and thereafter the Court grant the Writ of Habeas Corpus and dispose of the matter as law and justice requires.
DATED:

PETITIONER—MARK DAVID OLIPHANT

STATE OF WASHINGTON)
) ss.
County of KING)

MARK DAVID OLIPHANT, being first duly sworn, upon oath deposes and says: That he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

MARK DAVID OLIPHANT

SUBSCRIBED and SWORN to before me this 10 day of September, 1973.

NOTARY PUBLIC in and for the State of Washington, residing at; Suquamish, Wash.

DISTRICT COURT—EXHIBIT II TO SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS: AGREEMENT OF DEFENDANT TO APPEAR FOR TRIAL, DATED AUGUST 24, 1973

Filed Sept. 11, 1973

IN THE SUQUAMISH PROVISIONAL COURT ON THE PORT MADISON INDIAN RESERVATION

SUQUAMISH TRIBE *Plaintiff,* *v.* MARK OLIPHANT *Defendant.*	*NO. 1973-4* *AGREEMENT OF DEFENDANT TO APPEAR FOR TRIAL*

I hereby agree to appear for my trial in Suquamish Tribal Court to be held in Suquamish Tribal Office in Suquamish, Washington at 6:00 p.m. on September 25, 1973.

Dated this 24 day of August, 1973.

_____

Mark Oliphant

_____

Witness

_____

Witness

DISTRICT COURT—ORDER TO SHOW CAUSE AND SETTING HEARING

Filed Sept. 25, 1973

(Caption Omitted in Printing)

Petitioner filed a "Petition for Writ of Habeas Corpus" on August 23, 1973, and, by leave of Court, filed a "Supplement to Petition for Writ of Habeas Corpus" on September 11, 1973. In the "Order Granting Leave to File and Serve Supplement to Petition for Writ of Habeas Corpus," signed by the Court September 11, 1973, the petitioner was granted leave to serve the Petition on the additional respondents and it was ordered in open court that service would be made by the United States Marshal. A briefing schedule and hearing date were set on the assumption that service would be made immediately; however, the additional respondents have not yet been served or given notice of the hearing originally scheduled for October 11, 1973. Therefore, the Court modifies its earlier rulings in open court and

ORDERS that Edward Schlie, Chief of Police of the City of Bremerton, the original respondent, shall show cause why the writ should not be granted on the basis of the "Supplement to Petition for Writ of Habeas Corpus" on or before October 15, 1973. The additional respondents shall show cause why the writ should not be granted on the basis of the "Petition for Writ of Habeas Corpus" and the "Supplement to Petition for Writ of Habeas Corpus" on or before October 15, 1973. A memorandum of authorities shall be filed by petitioner on or before October 15, 1973. Answering memoranda, if any, may be filed by all parties on or before October 23, 1973. A hearing shall be had at 3:00 p.m., Thursday, October 25, 1973, before this Court.

In the returns and memoranda submitted pursuant to this Order, the Court requests that attention also be directed to these subjects:

1. Description of the various Indian lands, both Trust and non-Trust, involved in the present controversy and an analysis of their present status.
2. Description of the Suquamish Indian Tribe as presently constituted and the status of its members in relation to the lands in controversy.
3. Authority of the Suquamish Indian Tribe to promulgate its Code of Laws, affixed as Appendix A to the

Memorandum of Authorities of Amicus Curiae filed September 10, 1973.

4. Description of federal or state statutes or regulations, if any, which have limited or restricted the sovereign power of the Suquamish Indian Tribe.

The Clerk of this Court is hereby directed to mail an uncertified copy of this Order to petitioner and to counsel for the petitioner. The United States Marshal for this District is hereby directed to serve this Order, a copy of "Petition for Writ of Habeas Corpus," and a copy of "Supplement to Petition for Writ of Habeas Corpus" on all the named respondents.

DATED this 25 day of September, 1973, at Seattle, Washington.

/s/ Morill E. Sharp
UNITED STATES DISTRICT JUDGE

DISTRICT COURT—EXHIBIT 9 TO UNITED STATES MEMORANDUM OF AMICUS CURIAE: COMPLAINT, FOR VIOLATION OF OFFENSE OF SECTION 6, CHAPTER 3 OF SUQUAMISH INDIAN TRIBAL LAW AND ORDER CODE

Filed Oct. 26, 1973

IN THE SUQUAMISH PROVISIONAL COURT ON THE PORT MADISON INDIAN RESERVATION

THE SUQUAMISH INDIAN TRIBE,
Plaintiff,

vs. COMPLAINT

MARK DAVID OLIPHANT,
Defendant.

PERSONALLY APPEARED before me this date, _____, who, first being sworn complains and says: that one Mark Oliphant on or about the 19th day of August A.D. 1973 in the PORT MADISON RESERVATION, state of WASHINGTON, did commit the offense of section 6 chapter 3 as follows: While attempting to break up fight between this white man and (not eligible), was assaulted and knocked down causing bodily harm, contrary to the form, force and effect of the statutes in such case made and provided and against the peace and dignity of the SUQUAMISH TRIBE.

SAID COMPLAINT therefore prays that a warrant is issued for the arrest of said Mark Oliphant AND THAT HE BE DEALT WITH ACCORDING TO LAW.

/s/ (not eligible)

Subscribed and sworn to before me this _____ day of _____, A.D. 19 ___ .

(Unsigned) JUDGE

DISTRICT COURT—EXHIBIT 9 TO UNITED STATES MEMORANDUM OF AMICUS CURIAE: COMPLAINT, FOR VIOLATION OF OFFENSE OF SECTION 62, CHAPTER 3 OF SUQUAMISH INDIAN TRIBAL LAW AND ORDER CODE

Filed Oct. 26, 1973

IN THE SUQUAMISH PROVISIONAL COURT ON THE PORT MADISON INDIAN RESERVATION

THE SUQUAMISH INDIAN TRIBE,
Plaintiff,

vs. *COMPLAINT*

MARK DAVID OLIPHANT,
Defendant.

PERSONALLY APEARED BEFORE ME THIS DATE, _____ who, first being sworn complains and says: that one Mark Oliphant on or about the 19th day of August A.D. 1973 in the PORT MADISON RESERVATION, state of WASHINGTON, did commit the offense of section 62 chapter 3 as follows: Said defendant did wilfully and wrongly resist (not eligible) and knocked him down causing bodily harm (not eligible) apprehension but was (not eligible), contrary to the form, force, and effect of the statutes in such case made and provided and against the peace and dignity of the SUQUAMISH TRIBE.

SAID COMPLAINT therefore prays that warrant is issued for the arrest of said _____. AND THAT HE BE DEALT WITH ACCORDING TO LAW.

/s/ (not eligible)

_____

Subscribed and sworn to before me this _____ day of _____, A.D. 19___.

_____

(Unsigned) JUDGE

DISTRICT COURT—VERIFICATION OF RICHARD BELMONT, JR.

Filed Jan. 25, 1974

(Caption Omitted in Printing)

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, RICHARD BELMONT, JR., being first duly sworn upon oath, do depose and say:

1. I am the Chairman of the Suquamish Indian Tribe of the Port Madison Indian Reservation, Washington.

2. I have read the original Memorandum of Authorities of the Suquamish Tribe as Amicus Curiae as well as the additional Memorandum of Authorities of Additional Respondents and know the assertions in those memoranda to be true.

_____

RICHARD BELMONT, JR.

SUBSCRIBED AND SWORN to before me this 25th day of January, 1974.

_____

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

DISTRICT COURT—AFFIDAVIT OF MARTHA F. GEORGE

Filed Jan. 25, 1974

(Caption Omitted in Printing)

STATE OF WASHINGTON)
) ss.
County of King)

I, MARTHA F. GEORGE, being first duly sworn upon oath, depose and say:

1. I am eighty-one (81) years of age and an enrolled member of the Suquamish Indian Tribe.

2. I have lived within the area known as the Port Madison Indian Reservation for almost all my life. In my younger days I lived in Bremerton, Washington. I have lived in my present home for over fifty years. I have been well acquainted with all the members of the Suquamish Indian Tribe and "Certificate of Results of Suquamish Constitutional Election", a copy of which is attached to this Affadavit. I was elected and served as Chairman of the Suquamish Tribal Council for a period of three (3) years and one of the years was 1965 when the Constitution and By Laws of the Suquamish Indian Tribe was adopted.

3. Commencing approximately the year 1940 I attended meetings of the tribe quite regularly. To have a quorum it was necessary to have a meeting of twenty-eight (28) members or more. During that time most often not more than the members necessary to have a quorum of the general membership of the tribe would meet and it would be necessary at times to go out and bring in members of the tribe in order to have a quorum.

4. At all times from 1940 to the end of my chairmanship of the tribe there was never any talk at meetings by the members of passing laws to control the conduct of any person on the Port Madison Indian Reservation.

5. To be a member of the Suquamish Indian Tribe the Constitution requires a person to be one-eighth (⅛) Indian blood. I have made a list to my knowledge of all the enrolled members of the Suquamish Indian Tribe presently living on the Port Madison Indian Reservation. Their names and number are listed and with a question mark if they may not be an eligible member, as follows:

Adams family	
Mary	1
Margaret	1
Bernard	1
Pratt family	
Mildred	1
Willard	1
Harold (minor)	1
George family	
Martha	1
Lawrence family	
Chuck	1
Children (minors)	
Fowler family	5
Leonard	1
Ken	1
George family	
Marilyn	1
Children	5
Hawk family	
Cecelia	1
Children (2 minors)	4
Forsman family	
James	1
Marion	1?
Children (2 minors)	3?
Pratt family	
Agnes	1
Child (minor)	1
Loughry	
Ada	1
Mac	1
Webster	
Lawrence	1?
Child, adopted (minor)	1?
Deam family	
Charles	1
Child (minor)	1
Lindell family	
Mary	1
Children (minors)	5
Karrier	
Eddy	1
Children (minors)	4
Total members living on reservation	50

6. To my knowlege I have counted and made a list of the eligible voters that are now living within the boundaries of the Port Madison Indian Reservation and entitled to vote. Their number is approximately twenty-two (22).

7. All of the members living on the Port Madison Indian Reservation do not live in any local area, more or less together. Most of the members do not live in the area of the reservation. Different families living on the reservation live in different areas, some live on old allotments and others live on lands and pay taxes to the Kitsap County. Some live in the village of Suquamish, Millers Bay and other areas separated from another.

8. About four or five attend the Catholic Church, others do not attend church. None go to different or separate churches, schools from persons that are not members of the tribe. Chief Seattle Days was celebrated each year as sponsored by the American Legion. They had sponsored it every year for the past _____ years. The celebration was participated in by everyone, until 1973 when the present Tribal Council limited sponsorship and participation for Indian programs only.

/s/ 1/24/74

Martha F. George

SUBSCRIBED AND SWORN to before me
this 24th day of January, 1974.

/s/ PPM

Notary Public in and for the State of
Washington, residing at Seattle.

DISTRICT COURT—AFFIDAVIT OF ROBERT J. SMILEY

Filed Jan. 25, 1974

(Caption Omitted in Printing)

STATE OF WASHINGTON }
} ss
COUNTY OF KITSAP }

I, ROBERT J. SMILEY, being first duly sworn upon oath, depose and say:

1. I am the Associate Planner, Kitsap County Planning Department, employed by Kitsap County, Washington.

2. In 1969 the Kitsap Planning Department generated maps in Kitsap County, Washington, a copy of which is marked "MAP #7, Kitsap County Planning Map—1973". Represented on that map are dots indicating the number of dwellings located within the area mapped. The number of dwelling units was updated with information from building permits issued in Kitsap County, Washington. There are approximately a total of nine hundred seventy six (976) dwelling units, as indicated on Map #7 with the number thereof in a circle. A rough estimate of the population of the area occupying the dwellings is approximately three (3) persons per dwelling, for a total of two thousand nine hundred twenty-eight (2,928) living within the area marked on Map #4. Attached to this Affadavit is Maps of Petitioner's Memorandum of Authorities, the number of which I have referred to herein.

/s/ _____
Robert J. Smiley

SUBSCRIBED AND SWORN to before me this 25 day of January, 1974.

/s/ _____
Notary Public in and for the State
of Washington, residing at Seattle.

DISTRICT COURT—MEMORANDUM OPINION OF U.S. DISTRICT JUDGE MORILL E. SHARP

Filed April 5, 1974

(Caption Omitted in Printing)

This case involves the jurisdiction of an Indian tribal court over a non-Indian charged with commiting a criminal offense on tribal trust property.

Petitioner applied to this Court for a writ of Habeas Corpus and the matter came on for hearing September 11, 1973 and January 25, 1974, before the undersigned Judge. All parties appeared in person or by their counsel of record. The Court considered amicus curiae briefs submitted on behalf of Confederated Tribes of the Colville Indian Reservation, Quinault Tribe of Indians, National Tribal Chairmen's Association, Pima-Maricopa Tribes of the Gila River Reservation, Nisqually Tribe, and the Squaxin Island Tribe.

Petitioner, Mark David Oliphant, a non-Indian, was arrested by tribal deputy police, acting under the authority of the Squamish Indian Tribe of the Port Madison Indian Reservation, at 4:20 a.m. on August 19, 1973. Petitioner was charged with assaulting a tribal police officer and resisting arrest on land within the boundaries of the Port Madison Indian Reservation, which is held in trust by the United States for the benefit of the Squamish Indian Tribe. All acts alleged to have been committed by petitioner took place on the tribal encampment grounds on this trust land. Thirty-six acres of tribally-owned trust land, including the tribal encampment ground, were leased by the Squamish Indian Tribe to Chief Seattle Properties, Inc., a Washington corporation. The arrest took place during the Suquamish tribal celebration known as Chief Seattle Days, and a number of Indians were encamped on the tribal grounds to attend the celebration.

Following his arrest, petitioner was arraigned and bail was set in the amount of $100 for each charge, for a total of $200. Petitioner did not put up the bail and was incarcerated for a period of five (5) days in the Bremerton City Jail, as a prisoner of the Suquamish Indian Tribe, under an agreement between the City of Bremerton and the Bureau

of Indian Affairs providing for the holding of tribal prisoners in the jail facility. On August 24th, petitioner was released on his personal recognizance from the City of Bremerton Jail pursuant to an order of the tribal court.

Trial was set in tribal court for September 25, 1973. After the filing of this application for writ of habeas corpus, the tribal court continued the matter pending outcome of this federal court action.

On January 25, 1974, respondent Edward Schlie was dismissed from this proceeding by this Court in that he no longer had custody or control over the petitioner.

The Port Madison Indian Reservation was established pursuant to the Treaty of Point Elliott, January 22, 1855, and encompasses land established by an official survey approved May 5, 1860, as well as land added to the Reservation by a Department of Interior order dated October 21, 1864. The boundaries are also indicated by a survey approved September 8, 1874. These surveys established that the Port Madison Reservation is located on the mainland opposite Bainbridge Island in Township 25 and 26 North, Range 2 East, W.M., State of Washington. There have been no Congressional enactments or other federal action terminating or diminishing the boundaries of this reservation, either expressly or by implication. The alleged criminal acts took place on Government Lot 3, Section 21, Township 26 North, Range 2 East, W.M., State of Washington, which is within the established boundaries of the reservation.

The Suquamish Indian Tribe is a federally approved tribe organized under the Indian Reorganization Act of 1934 and operating under a valid constitution and bylaws. Under the Indian Reorganization Act of 1934, Indian tribes were authorized to organize and function as local governmental bodies on reservations and certain inherent sovereign powers of the tribes were recognized. The Suquamish Indian Tribe is a tribe so organized.

The tribe has established a valid justice and law enforcement program on the reservation by enactment of an approved Law and Order Code and the establishment of a police system and tribal court. The existence of the tribe and its right to carry out government services has at all times been recognized by the Department of Interior, United States Congress, and the courts.

Once a reservation has been established, all tracts in-

cluded within it remain a part of the reservation until separated therefrom by Congress. *U.S. v. Celestine*, 215 U.S. 278 (1909). A Congressional determination to terminate must be expressed upon the face of a Congressional act or be clear from the surrounding circumstances and legislative history of an enactment. *Mattz v. Arnett*, 412 U.S. 481 (1973). Congress has not terminated or diminished the Port Madison Indian Reservation or changed or abolished its boundaries since the enlargement in 1864. Merely opening the reservation to non-Indian settlement does not terminate nor diminish the reservation boundaries. Since Congress has not terminated or diminished the reservation, the boundaries described above still constitute the boundaries of the Port Madison Indian Reservation.

The nature of Indian tribal powers is marked by three fundamental principles: (1) an Indian tribe possessed, in the first instance, all the powers of any sovereign state; (2) Congress rendered the tribe subject to the legislative power of the United States, and, in substance, terminated the external powers of sovereignty of the tribe but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government; and (3) these internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, the powers of internal sovereignty have remained in the Indian tribe and their duly constituted organs of government. *Worcester v. Georgia*, 31 U.S. 515 (1832).

So long as a complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Furthermore, an Indian tribe's powers of local self-government originally included the power to enact criminal laws pertaining to non-Indians and to confer upon its tribal court jurisdiction over the person of a non-Indian to enforce such laws on those lands reserved for such Indians within the established boundaries of their reservation. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government, i.e., the United States Government. 55 I.D. 14 (October 25, 1934). Therefore, the

Suquamish tribe may exercise its powers of local government over a non-Indian who enters within the tribe's territorial jurisdiction and commits an offense defined as a crime by its local tribal laws unless Congress has expressly extinguished the tribe's original inherent powers of self-government with respect to such a crime.

Although the acts of petitioner may constitute a federal crime under the general criminal laws of the United States, the same acts may also constitute a tribal crime under the local laws of the Suquamish Indian Tribe for which the offender may be lawfully prosecuted and punished by the Suquamish tribal court. In the present case, the United States has chosen not to assert its jurisdiction and the tribe has asserted its share of the concurrent jurisdiction of the tribe and the United States.

This conclusion is consistent with the policy of Congress and the Secretary of the Interior to encourage, stimulate and educate Indian tribes to establish and strengthen their local governments and courts to handle their law enforcement problems according to tribal laws.

Congress has, to an extent, limited the governmental powers of the Suquamish tribe to enforce its local laws in that an Indian tribe may not enact local laws which conflict directly with federal laws applicable in Indian country and its criminal jurisdiction is limited to a criminal penalty of not more than six months imprisonment or a fine of $500 or both for any one offense in violation of its tribal laws.

In addition, Congress has granted certain protections to persons subject to tribal jurisdiction in 25 U.S.C. §1302 of the Indian Civil Rights Act of 1968. This Act applies to both Indians and non-Indians alike when within tribal jurisdiction. *Dodge v. Nakai*, 298 F.Supp. 17 (D. Ariz. 1968). Thus, any person has the right to declaratory and injunctive relief by a federal court for violation of the Indian Civil Rights Act by tribal government. In addition, as in this case, a person may apply to the United States District Court for a writ of habeas corpus.

The Suquamish tribal court, the duly constituted and authorized branch of Suquamish tribal government, has jurisdiction over the subject matter and person of the petitioner and thus far has provided petitioner with all appropriate protections under the Indian Civil Rights Act of 1968 in accordance with concepts of due process and the

equal protection of the laws as in the United States Constitution.

The Court's conclusions as to the jurisdiction of the Suquamish Indian Tribe over non-Indians is restricted to the facts of this case, that is, criminal offenses over which the United States has not declared its jurisdiction occurring on land held in trust by the United States Government for the benefit of Indians within the exterior boundaries of the Port Madison Indian Reservation. Jurisdiction of the Suquamish tribe over non-Indians on fee patent lands within the reservation is not presently before the Court, and the Court expresses no views on the question.

In view of the jurisdiction of the Suquamish tribal court and the Suquamish tribe over the person and subject matter herein and the fact that petitioner has been afforded all the protections available to him under the Indian Civil Rights Act, judgment shall be entered denying the application for a writ of habeas corpus.

The Clerk of this Court is instructed to send uncertified copies of this Memorandum Opinion to all counsel of record.

DATED at Seattle, Washington, this _____ day of March, 1974.

/s/ Morill E. Sharp
UNITED STATES DISTRICT JUDGE

DISTRICT COURT—JUDGMENT

Filed April 5, 1974

(Caption Omitted in Printing)

This action came on for trial (hearing) before the Court, Honorable Morell E. Sharp, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the petition for a writ of habeas corpus is hereby denied and the petition is herewith dismissed.

DATED at Seattle, Washington, this 5th day of April, 1974.

/s/ _____
Betty Fleming
Deputy Clerk of Court

DISTRICT COURT—NOTICE OF APPEAL

Filed April 30, 1974

(Caption Omitted in Printing)

NOTICE IS HEREBY GIVEN that MARK DAVID OLIPHANT, Petitioner above-named, hereby appeals to the United States Court of Appeals for the 9th Circuit from the Judgment entered in this action on the 10th day of April, 1974 denying the issuance of a Writ of Habeas Corpus as petitioned for herein.

/s/ _____
PHILIP P. MALONE,
Attorney for Petitioner

NINTH CIRCUIT COURT OF APPEALS—OPINION

Filed Aug., 24, 1976

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK DAVID OLIPHANT,
Plaintiff-Appellant,
vs.
EDWARD SCHLIE, Chief of Police of the CITY OF BREMERTON, and THE SUQUAMISH INDIAN TRIBE — RICHARD BELMONT, JR., Chairman of Council of SUQUAMISH INDIAN TRIBE; DONALD BREAD, Suquamish Tribal Manager; FRED GUARDIPEE, Suquamish Tribal Police Officer; GRACE DUGGAN, Suquamish Tribal Judge; CECILIA HAWK, Suquamish Tribal Judge; and GEORGE M. FELSHAW, Superintendent of the Western Washington Tribal Agency,
Defendant-Appellees.

No. 74-2154
OPINION

Appeal from the United States District Court
for the Western District of Washington

Before: DUNIWAY and KENNEDY, Circuit Judges, and BURNS,* District Judge

DUNIWAY, Circuit Judge:

This case involves a question of Indian law which has been unresolved since it first arose almost a century ago; what is the jurisdiction of an Indian tribe over non-Indians who commit crimes while on Indian tribal land

* The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

within the boundaries of the reservation? *See Ex parte Kenyon*, C.C.W.D. Ark., 1878, Fed. Cas. No. 7720, 14 Fed. Cas. 353. Oliphant was arrested on the Port Madison Indian Reservation in the state of Washington by Suquamish tribal police on August 19, 1973, and charged before the Provisional Court of the Suquamish Indian Tribe with assaulting an officer and resisting arrest. He was incarcerated by order of the tribal court in lieu of $200 bail, but then released on his own recognizance by that court. Before trial he petitioned the United States District Court for a writ of habeas corpus, alleging that an Indian tribal court can have no jurisdiction over a non-Indian. The district court denied the writ and Oliphant appeals. We affirm.

Jurisdiction in this case is founded on 25 U.S.C. §1303 and 28 U.S.C. §§2241(c) (1) and (3). *See Colliflower v. Garland*, 9 Cir., 1965, 342 F.2d 369, 379. Oliphant's release on his own recognizance did not deprive the district court of jurisdiction. *Hensley v. Municipal Court*, 1973, 411 U.S. 345.

Oliphant argues that the Suquamish have no jurisdiction over non-Indians because Congress never conferred such jurisdiction on them. This misstates the problem.[1] The proper approach to the question of tribal criminal jurisdiction is to ask "first, what the original sovereign powers of the tribes were, and, then, how far and in what respects these powers have been limited." Powers

[1] The dissenting opinion similarly misstates the problem. The question is not whether Congress has conferred jurisdiction upon the tribe. The tribe, before it was conquered, had jurisdiction, as any independent nation does. The question therefore is, did Congress (or a treaty) take that jurisdiction away? The dissent points to no action by the Congress, and no treaty language, depriving the tribe of jurisdiction. The language of the 1791 treaty with the Cherokees, cited in footnote 5 of the dissent, is no more than a waiver of the right that all nations retain, to endeavor, through diplomatic means to protect their citizens who go or reside abroad. The waiver is limited to those citizens who elect to settle on Indian land. It does not, expressly or by implication, reject the universal rule that one who visits another nation subjects himself to its jurisdiction. It does not imply that absent the treaty provision, the Cherokees would have lacked jurisdiction. Much less does it imply that the jurisdiction of the Cherokees over citizens was to be limited to those who settled on Cherokee lands. A citizen visitor to the Cherokee nation, like the settler, would be subject to its jurisdiction, but, unlike the settler, could invoke the diplomatic protection of the United States.

of Indian Tribes, 1934, 55 I.D. 14, 57. *See Ortiz-Barraza v. United States*, 9 Cir., 1975, 512 F.2d 1176, 1179. "It must always be remembered that the various Indian tribes were once independent and sovereign nations. . . ." *McClanahan v. Arizona State Tax Comm.*, 1973, 411 U.S. 164. 172, who, though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress. *Worcester v. Georgia*, 1832, 6 Pet. (31 U.S.) 515, 560–61; *Cherokee Nation v. Georgia*, 1831, 5 Pet. (30 U.S.) 1, 17–18.

Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed. As the Eighth Circuit held seven decades ago when it upheld the right of the Creek Nation to tax non-Indian residents:

> It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. *Buster v. Wright*, 8 Cir., 1905, 135 F. 947, 950, *appeal dismissed*, 1906, 203 U.S. 599.

The Supreme Court, in dictum, has declared not only that Indian tribes have criminal jurisdiction, but that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Williams v. Lee*, 1959, 358 U.S. 217, 220.

As we recently said in *United States v. Burns*, 9 Cir., 1975, ___ F.2d ___ (No. 74–3022, Dec. 22, 1975):

> Just as state law is not to apply on Indian lands, unless expressly authorized by federal statute, so also, federal enclave law is not to apply unless expressly authorized. ___ F.2d at ___ (slip op. at 4)

We turn to the relevant treaties and Congressional acts to see whether any has withdrawn from Suquamish the power to punish Oliphant for a violation of the tribal law and order code. Our approach is influenced by the long-standing rule that "legislation affecting the Indians is to

be construed in their interest." [2] *United States v. Nice*, 1916 241 U.S. 591, 599; *Santa Rosa Band of Indians v. Kings County* 9 Cir., 1975, ___ F.2d ___ (Nov. 3, 1975, slip op. at 6–7). *See also Bryan v. Itasca County*, 1976, ___ U.S. ___ (June 14, 1976, slip op. at 18–19); *McClanahan v. Arizona State Tax Comm.*, *supra*, 411 U.S. at 174.

The starting point in determining how much of their original sovereignty the Suquamish have lost is the Treaty of Point Elliott, 12 Stat. 927 (1859), the first treaty between these people and the Untied States. While other treaties with other tribes had expressly granted or withdrawn the power to try non-Indian criminals, the Treaty of Point Elliott was silent on the subject. M. Price, LAW AND THE AMERICAN INDIAN 22–27 (1973). The only significant surrender of internal autonomy was contained in Article IX of the Treaty, in which the Indian signatories agreed not to "shelter or conceal offenders against the law of the United States, but to deliver them up to the authorities for trial." 12 Stat. 929. *See Arizona ex rel. Merrill v. Turtle*, 9 Cir., 1969, 413 F.2d 683, *cert. denied*, 1970, 396 U.S. 1003.

The second and last treaty or agreement between the Suquamish and the United States, 33 Stat. 1078 (1905), involved the relinquishment of land by the Indian tribes residing on the Port Madison reservation. It did not mention the transfer of any powers and specifically provided that it did not deprive the Indians of any benefits "not inconsistent with the provisions of this agreement." 33 Stat. 1079. No treaty has deprived the Suquamish of criminal jurisdiction over Oliphant. We therefore shift our attention to Congressional acts.

Oliphant relies on three statutes to support his thesis that Indian tribes do not have criminal jurisdiction over non-Indians. First, he argues that 18 U.S.C. §1152 has withdrawn criminal jurisdiction over non-Indians from Indian tribes. We cannot read §1152 as withdrawing from Indian tribes criminal jurisdiction that they otherwise possess. It extends federal criminal laws applicable to federal enclaves to Indian country, but it does not attempt either to extinguish tribal jurisdiction or to declare federal jurisdiction exclusive. In light of the principles of statutory construction enunciated in *Nice*, *supra*, and *Santa Rosa*

[2] The dissent also flies in the face of this long standing rule.

Band of Indians, *supra*, this could end our inquiry. However, we find additional support in the legislative history of §1152.

Section 1152 originated as §4 of the Indian Trade and Intercourse Act of 1802, 2 Stat. 141. It was reenacted in 1817 (3 Stat. 383), 1834 (§25 of the Trade and Intercourse Act, 4 Stat. 733), and 1854 (§3 of the Act of March 27, 1854 10 Stat. 270), when it was modified to eliminate the possibility that an Indian subjected to tribal discipline could also be tried in federal court.[3] Except for minor language changes when it was incorporated into the Revised Statutes and later into the United States Code, §1152 has not changed since 1854.

Our reading of the Congressional history convinces us that §1152 was not intended, and should not be read, to prohibit Indian tribes from prosecuting non-Indians for offenses against tribal law committed on the reservation. Section 1152 can be explained more rationally as an attempt to protect Indian tribes, who had no established legal system and whose authority was frequently challenged by unsympathetic state governments, *see Cherokee Nation v. Georgia*, *supra*, from depredations by "unprincipled white men." H.R. Rep. No. 474, 23 Cong., 1st Sess. 98 (1834).

> [I]t is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision [§25 of the Trade and Intercourse Act of 1834] is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. *Id.* at 13.[4]

[3] That this measure did not also protect non-Indians against double jeopardy does not indicate that only Indians were susceptible to federal and tribal discipline. Passed during the Kansas-Nebraska debates of 1854, this measure was disposed of rapidly and almost without debate. Section 3 may well have protected only Indians from double jeopardy merely because, in the only case in which a person had suffered both tribal and federal punishment, the defendant happened to be a Creek Indian. 23 Cong. Globe 700–01 (1854).

[4] As stated in the House Report on a companion bill to establish a western Indian territory: "As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes." *Id.* at 18.

Only one case cited by Oliphant, *Ex parte Kenyon*, *supra*, tends to support his argument that §1152 deprives Indian tribes of jurisdiction over non-Indians.[5] *Kenyon*, however, concerned a crime committed outside the territorial boundaries of "Indian country," a fact which figured prominently in the court's opinion. *See Elk v. Wilkins*, 1884, 112 U.S. 94, 108. The assertion that an Indian tribe can have no jurisdiction over a non-Indian was dictum, mentioned only in passing and without supporting authority. Our *de novo* examination of Indian law decisions since *Cherokee Nation v. Georgia*, *supra*, convinces us that the statement by Judge Parker in *Kenyon* and cited as supporting Oliphant's position is wrong. LAW AND THE AMERICAN INDIAN, *supra*, 471–75; Recent Developments, *Indian Tribal Courts*, 18 ST. LOUIS U.L.J. 461, 462–64 (1975).

Second, Oliphant argues that the Indian Civil Rights Act of 1968, 25 U.S.C. §1302, ousts the tribal court of jurisdiction. That Act applies certain due process requirements to Indian tribes exercising powers of self-government because the Supreme Court in *Talton v. Mayes*, 1896, 163 U.S. 376, had held that the Bill of Rights in the Federal Constitution did not apply to Indian tribal governments. Nothing in the Indian Bill of Rights purports to withdraw any criminal jurisdiction of the Indian tribes. It recognizes such jurisdiction, but prescribes certain due process type limitations upon its exercise.

Section 1302 provides: "No Indian tribe in exercising powers of self-government shall—. . . (7) . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both; . . . (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons." Oliphant argues that a fair trial for him is impossible because non-Indians would be excluded from the venire. This issue is raised prematurely. Oliphant is entitled to a fair trial; if he should be denied one, appeal from a conviction or a petition for a writ of habeas corpus would then be

[5] The additional authorities cited by Oliphant, F. Cohen. HANDBOOK OF FEDERAL INDIAN LAW 148 (1945) and Criminal Jurisdiction of Indian Tribes over Non-Indians, 1970, 77 I.D. 113, *withdrawn* January 25, 1974, base their conclusions entirely on *Kenyon*. They are, therefore, only as persuasive as their source.

appropriate. Further discussion of this contention is unnecessary.

Third, Oliphant argues that §7 of Public Law 280 (P.L. 83–280, 67 Stat. 590, 1953, modified by P.L. 90–284, §401, 82 Stat. 78, 1968; 25 U.S.C. §1321) deprives the Suquamish of jurisdiction over him. This statute permits a state to assume certain criminal jurisdiction in Indian country, with the consent of the affected tribe. Pursuant to this law, Washington adopted a statute, Laws of 1957, ch. 240, assuming jurisdiction whenever the governor of the state received the tribal assent. The Suquamish consented and on May 15, 1958, the Governor proclaimed the effectiveness of the state jurisdiction.

However, in 1968, Congress provided for retrocession by a state of the jurisdiction assumed by it under §1321. P.L. 90–284, 82 Stat. 79, 25 U.S.C. §1323. On August 26, 1971, the Governor of Washington proclaimed retrocession to the United States of jurisdiction over the Suquamish Port Madison Indian Reservation. By Executive Order No. 11435, 33 F.R. 17339, the President designated the Secretary of the Interior as authorized to exercise the authority of the United States under §1323, his acceptance of retrocession to be effective by being published in the Federal Register. On April 14, 1972, the Secretary accepted the retrocession proclaimed by the Governor. 37 F.R. 7353.

Oliphant argues that the Governor's proclamation was invalid under state law and can have no effect. In our opinion, the question is one of federal law, not state law. The acceptance of the retrocession by the Secretary, pursuant to the authorization of the President, made the retrocession effective, whether or not the Governor's proclamation was valid under Washington law. In this respect, we agree with the views of Judge Denney in *United States v. Brown*, D. Neb., 1971, 334 F. Supp. 536, 540–41:

> The federal government, having plenary power over the Indians, had the power to prescribe any method or event it desired to trigger its own re-assumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all.
>
> The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal gov-

ernment upon what appeared to have been a valid state action, are all factors to be considered and lead the Court to the conclusion that the federal interpretation of the effectiveness of state action triggering the reassertion of federal jurisdiction is and was controlling. "Retrocession" does not imply any particular procedure or action on the part of the states involved and the need for finality and importance of the various competing interests here dictates that the state action presented complies with the federal requirements of "retrocession."

The federal government, having the power to preempt jurisdiction over the Omaha Reservation, had the power to so define and construe the word "retrocession" as to remove from the determination of federal assumption of jurisdiction any question of the procedural validity or invalidity of the state's act of retrocession. Considering the problems presented by any other holding, the Court holds that the term "retrocession," as determined by the Secretary of Interior, was fulfilled by such action as the state took in Resolution 37.

To the same effect is *Omaha Tribe v. Village of Walthill*, D. Neb., 1971, 334 F. Supp. 823, *affirmed*, 8 Cir., 1972, 460 F.2d 1327, *cert. denied*, 1973, 409 U.S. 1107.

Finally, we consider whether the exercise of criminal jurisdiction by the Suquamish in cases such as this one would interfere with or frustrate the policies of the United States. The sections of the tribal law and order code under which Oliphant is charged do not punish conduct otherwise privileged or authorize actions otherwise illegal under federal law. Thus no explicit conflict exists. Moreover, the federal government has been encouraging Indian tribes to adopt law and order codes, set up tribal courts, and exercise authority over reservation lands. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535. Tribal criminal jurisdiction over non-Indians, as limited by the Indian Bill of Rights, is a small but necessary part of this policy.[6]

[6] Our decision in *The Quechan Tribe of Indians v. Rowe*, 9 Cir., 1976, 531 F.2d 408, is not contrary to our conclusions. It applies the same principles that we apply, but finds in the tribal constitution an express limitation of the jurisdiction of tribal courts to "the trial and punishment of members of the tribe." It leaves open the question that we now decide. (see p. 411 & fn. 4).

Not only does the law relating to Indian tribes support the jurisdiction here in question; practical considerations also support it. It may not be as true as it once was that "[t]hey [the Indians] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *United States v. Kagama*, 1886, 118 U.S. 375, 384. But antagonism between reservation Indians and the surrounding populations does persist. History, broken promises, cultural differences and neglect all contribute to it. Reluctance on the part of the States to accord to the Indians rights guaranteed to them by treaties still exists. *See, e.g., United States v. Washington*, 9 Cir., 1975, 520 F.2d 676, and the concurring opinion of Judge Burns at page 693. Part of the problem no doubt stems from the tax exemptions that Indians enjoy. *See, e.g., McClanahan v. Arizona State Tax Commission, supra.*

This case well illustrates the need for the jurisdiction here involved. The events occurred in Suquamish Tribal encampment grounds, during a Tribal celebration known as Chief Seattle Days, at a time when a number of Indians were encamped on the Tribal grounds. Counsel for the Tribe describe the situation as follows: (appellees' brief, pages 27–28):

> . . .When the Suquamish Indian Tribe planned its annual Chief Seattle Days celebration, the Tribe knew that thousands of people would be congregating in a small area near the tribal traditional encampment grounds for the celebration. A request was made of the local county to provide law enforcement assistance. One deputy was available for approximately one 8-hour period during the entire weekend. The tribe also requested law enforcement assistance from the Bureau of Indian Affairs, Western Washington Agency. They were told that they would have to provide their own law enforcement out of tribal funds and with tribal personnel.
>
> Appellant was arrested at approximately 4:30 A.M. The only law enforcement officers available to deal with the situation were tribal deputies. Without the exercise of jurisdiction by the Tribe and its courts, there could have been no law enforcement whatsoever on the Reservation during this major gathering which clearly created a potentially dangerous situation with regard to law enforcement. Public safety is an underpinning of a political entity. If tribal members cannot protect them-

selves from offenders, there will be powerfu' motivation for such tribal members to leave the Reservation, thereby counteracting the express Congressional policy of improving the quality of Reservation life.

Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated. Federal prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel to witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence.

Prosecutors in counties adjoining Indian reservations are reluctant to prosecute non-Indians for minor offenses where limitations on state process within Indian country may make witnesses difficult to obtain, where the jurisdiction division between federal, state and tribal governments over the offense is not clear, and where the peace and dignity of the government affected is not his own but that of the Indian tribe.

Traffic offenses, trespasses, violations of tribal hunting and fishing regulations, disorderly conduct and even petty larcenies and simple assaults committed by non-Indians go unpunished. The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows.

The order appealed from is affirmed.

MARK DAVID OLIPHANT v. EDWARD SCHLIE, Chief of Police of the City of Bremerton, and THE SUQUAMISH INDIAN TRIBE, et al.

KENNEDY, Circuit Judge, Dissenting:

I cannot agree with either the premises or the conclusion of the majority opinion, and therefore I respectfully dissent.

As the majority points out, the question whether Indian courts may exercise jurisdiction over non-Indians has remained unanswered for almost 100 years. The reason is that no federal court has had occasion to pass on the issue since *Ex parte* Kenyon, 14 Fed. Cas. 353 (No. 7720 W.D. Ark. 1878). The very absence of legal authority to support the contentions made on behalf of the tribal court indicates to me that the jurisdiction it attempts to exercise is novel and unusual, and certainly inconsistent with prior practice.[1] While this does not necessarily make the procedure improper, it does call for careful examination of the purpose and history of tribal courts to determine whether an assertion of jurisdiction over non-Indians is consistent with the powers granted by Congress to tribal governments during the last 100 years. Such an examination has persuaded me that Indian courts were not intended to have jurisdiction over non-Indians.

It is important to focus on the precise issue in this case. We are not considering whether Indian tribes may pass reservation ordinances, having the force of law, governing the conduct of the tribe's members; they may. Colliflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965). Nor are we determining whether Indians have the right to exclude from the reservation nonmembers they deem undesirable; they have. Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976). Nor is there any question of potential lawbreakers' going unpunished, a point given special emphasis by the majority, for we have held that tribal

[1] Certain tribal codes expressly prohibit the assumption of jurisdiction by the tribal court of non-Indian offenders. *See, e.g.*, Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976); 17 Navajo Tribal Code §101 *et seq.*; *Hearings on the Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess., pt. 3, at 679 (1963); *id.* pt. 2, at 385.

authorities have the power to apprehend violators of state and federal law and to deliver the offenders to the appropriate authority.[2] Oriz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). The sole question here is whether the accused, a non-Indian, suspected of having committed a violation on the reservation, must answer for the alleged offense before an Indian tribunal.

The answer to this question is not advanced by the majority's broad assertion that Indian tribes have inherent sovereignty presumed to exist in the absence of express congressional intent to the contrary. The broad dictum on Indian sovereignty pronounced by Chief Justice Marshall in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560–61 (1832), was a response to a state's attempted invasion of tribal privileges that had express federal sanction. As pointed out in a recent survey, Supreme Court cases generally rely on the notion of tribal sovereignty in determining the extent to which states can properly exercise jurisdiction where the federal government has decreed a measure of autonomy for the tribes. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?* 51 NOTRE DAME LAWYER 600, 627 (1976). The term "sovereignty," then, is merely a veil used where the issue is, in fact, one of federal preemption of regulation in the field of Indian affairs. *Id.* at 629–31; *see* McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973).[3]

A different problem is presented when the controversy is not one involving state encroachment of a tribal privilege conferred by Congress, but is rather the exercise of tribal jurisdiction over an individual. Principles of "tribal sovereignty" developed in the preemption context simply have no application here. This Court, for example,

[2] By assaulting the tribal police officer, Oliphant was likely guilty of violating one or several of the following federal statutes: 18 U.S.C. §§111, 113, 1114, 1152; *see* Stone v. United States, 506 F.2d 561 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975).

[3] The power of Congress to divest tribes of any and all of their sovereign attributes is, of course, undisputed. For example, legislation has terminated the existence of various Indian tribes. 25 U.S.C. ch. 14.

As the Supreme Court recognized almost a century ago, only two truly sovereign entities exist at any place within the geographical limits of the United States: the federal government and the states of the union. United States v. Kagama, 118 U.S. 375, 379 (1886).

did not hesitate to control the exercise of power by tribal governments by ordering the issuance of a writ of habeas corpus, long before Congress enacted 25 U.S.C. § 1303. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

The concept of sovereignty applicable to Indian tribes need not include the power to prosecute nonmembers. This power, unlike the ability to maintain law and order on the reservation and to exclude undesirable nonmembers, is not essential to the tribe's identity or its self-governing status. In fact, even as to tribal members, tribal courts only possess jurisdiction over petty offenses involving less than six months imprisonment and $500 fine. 25 U.S.C. §1302(7). Major crimes are prosecuted in federal court. 18 U.S.C. §1153. Therefore I do not find the doctrine of tribal sovereignty analytically helpful in this context and instead find it necessary to look directly at the applicable legislation to determine whether Congress intended the tribal courts to have the power to exercise jurisdiction over nonmembers.

As early as the turn of the ninetenth century Congress evidenced an intention to treat offenses by Indians against each other differently from offenses involving a non-Indian. Offenses in the latter category, where either the perpetrator or the victim was a non-Indian, were proscribed by specific statute. Indian Trade and Intercourse Act of March 30, 1802, ch. 13, §§4, 14, 2 Stat. 141, 143–44. Offenses in the first category "were left to be dealt with by each tribe for itself, according to its local customs." *Ex parte* Crow Dog, 109 U.S. 556, 571–72 (1883). This policy, the Court explained, reflected a recognition that it would be unfair to apply white men's standards of justice to interactions exclusively between Indians, who belonged to a separate culture. *Id.* at 571. The Court noted, moreover, that tribal courts were an integral part of tribal self-government:

> The pledge to secure to these people . . . an orderly government . . . necessarily implies . . . that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace *among their own members* by the administration of their own laws and customs.

Id. at 568 (emphasis added).

These considerations are, of course, not applicable where a non-Indian commits a crime on a reservation. There is no danger, in trying a non-Indian in state or federal court, that he will be subjected to cultural standards to which he is not accustomed. Nor is such a trial in derogation of the tribe's ability to control its own members.

In light of the above, silence in the Treaty of Point Elliott on the subject of tribal court jurisdiction cannot be taken as an assent to jurisdiction over all persons. Such silence, if it imparts any information at all, must be understood in light of then prevailing policies, which do not appear to have permitted jurisdiction by Indian tribes over non-Indians.[4] In earlier treaties, in fact, Congress had in certain instances specified that Indians might have jurisdiction over white men.[5] This practice changed for later treaties.[6] An opinion of the Attorney General, issued the

[4] Even commentators who argue in favor of tribal court jurisdiction over non-Indians have recognized that this would be a novel practice and inconsistent with the views that have prevailed for over a century in Congress and the administrative agencies in charge of Indian affairs; M. PRICE, LAW AND THE AMERICAN INDIAN 174 (1973); *see* Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62, 92–94 (1959).

Law and order regulations promulgated by the Department of the Interior for Courts of Indian Offenses are explicitly limited to offenses committed by Indians. 25 C.F.R. §11.2CA-11.87NH (1975). These regulations, which were first promulgated in 1892, *see* Report of Commissioner of Indian Affairs, T.J. Morgan, Aug. 27, 1892, *reprinted in* 1 W. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES 574 (1973), have been adopted as tribal codes by various Indian tribes. *See, e.g.*, Comment to §1 of title 17 of the Navajo Tribal Code.

[5] The 1791 treaty with the Cherokees, for example, provides:

> If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please.

Art. VIII, 7 Stat. 39, 40 (1791). This provision, of course, raises two separate inferences. First, the specific grant by Congress of jurisdiction over non-Indians who have settled on the reservation implies that such jurisdiction was not assumed to exist otherwise. More importantly, however, the grant of jurisdiction over certain whites only, those who have undertaken an affirmative act to affiliate themselves with the reservation, raises the strong inference that other whites were not subject to tribal jurisdiction.

[6] U. S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 323 (1958) notes that such provisions in early treaties merely followed the practice accepted with respect to international treaties. Later treaties, however, evidenced a change in this policy.

same year in which the Treaty of Point Elliott was signed, describes negotiations on this point with an Indian tribe:

> [T]he Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own laws, "any white man" who shall come into the nation, and infringe any of their national regulations, (art. 4). But Congress did not accede to this request. On the contrary, it had made provision, by a series of laws, for the punishment of crimes affecting white men, committed by or on them in the Indian country, including that of the Choctaws, by the courts of the United States. (See act of June 30, 1834, iv Stat. at Large, p. 729, and act of June 17, 1844, v Stat. at Large p. 680.) These Acts cover, so far as they go, all crimes except those committed by Indian against Indian.

7 OP. ATT'Y. GEN. 174, 179 (1855). The contemporary refusal to grant other Indian tribes this very power over non-Indians indicates that the federal government did not consider such power an inherent attribute to tribal sovereignty. Absence of such an empowering provision in the treaty with the Suquamish raises a strong inference that Congress did not intend them to exercise such jurisdiction.

Modern day pronouncements of both Congress and the Interior Department reflect that view that tribal court jurisdiction does not extend to non-Indians. During House and Senate debates on the Indian Civil Rights Bill, supporters of the measure consistently referred to it as limiting "the power of tribal courts in dealing with tribal members." [7] No reference was made to the possibility that

[7] *See* Remarks of Rep. Reifel, 114 CONG. REC. 9552–53 (Apr. 10, 1968):

> Basically, these titles would accomplish two major objectives: First, they would create a bill of rights *for the protection of Indians* tried by tribal courts, and would improve the quality of justice administered by those courts; and second, they would provide for the assumption of civil and criminal jurisdiction by States over Indian country within their borders only with the consent of the tribes affected. Both of these objectives are important *to our Indian citizens;* the accomplishment of each of these objectives is long overdue.
>
> Mr. Speaker, at the present time when *an Indian citizen* appears before State or Federal courts he is accorded the constitutional rights of all Americans. But when that *same Indian citizen* is brought to book before a tribal court, which has power to punish him usually for as long as 6 months in jail, he has only those rights which the tribe is

these courts might exercise jurisdiction over nonmembers. A 1970 opinion by the Interior Department Solicitor [8] flatly concluded: "Indian tribes do not possess criminal jurisdiction over non-Indians[;] such jurisdiction lies in either the state or Federal Governments." 77 I.D. 113, 115 (1970).[9]

willing to recognize. Many tribes have behaved responsibly in the administration of justice on the reservations. Too often, however, tribal courts have not acted judiciously.

And more important, Mr. Speaker, under present procedures we have no way of telling whether a tribal court has abused its powers because it is usually not possible for a defendant to ever raise a question in an appeal or in a habeas corpus proceeding.

The enactment of this bill would clearly set forth certain fundamental *limitations on the power of tribal courts in dealing with tribal members:*

It would prohibit double jeopardy;

It would provide for the privilege against self-incrimination;

It would require a speedy and public trial;

It would require that the accused be informed of the nature of the offense charged, that he be confronted by witnesses against him, and that he have compulsory process for obtaining witnesses in his own favor;

It would prohibit excessive bail, and would provide by statute for a maximum punishment by a tribal court of 6 months in jail or $500 fine; and

It would provide for imprisonment only after a jury trial is requested by the defendant. [emphasis added.]

See also, Remarks of Sen. Ervin, 113 CONG. REC. 13,473 (May 23, 1967):

1. The historical development of a unique relationship between the Indian communities and the United States has resulted in a situation in which there exists, unfortunately, both the potentiality and the actuality of deprivation of individual rights by tribal governments.

2. Through evidence of the denial of substantive and political rights has been brought to the subcommittee's attention, it is apparent that *an Indian citizen's rights* are most seriously jeopardized by the tribal government's administration of justice. These denials occur, it is also apparent, not from malice or ill will, or from a desire to do injustice, but from the tribal judges' inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system. [Emphasis added.]

[8] This memorandum was cited with approval in 78 I.D. 229,230 (1971). While the Interior Department has subsequently withdrawn this Memorandum, it has not published any position inconsistent therewith. In any case, the Memorandum is strong evidence of the Department's longstanding policy in this area. *See* M. PRICE, LAW AND THE AMERICAN INDIAN 173 (1973).

[9] *Accord,* W. BROPHY & S. ABERLE, THE INDIAN—AMERICA'S UNFINISHED BUSINESS 50 (1966); Newman, *Jurisdiction Over Indians and Indian Land in Washington,* in 1 STUDIES IN AMERICAN INDIAN LAW 232, 239 (R. Johnson *ed* 1970); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments,* 82 HARV. L. REV. 1343, 1356–57 (1969); *see* Comment, *The "Right of Tribal Self-Government" and Jurisdiction of Indian Affairs,* 1970 UTAH L. REV. 291, 298.

The current federal scheme for dealing with offenses on Indian land is consistent with the premise that Indian courts do not have jurisdiction over non-Indians. The interaction of sections 1152 and 1153 of title 18 of the Code leave little doubt on this matter.

Section 1152 makes federal law, including the Assimilative Crimes Act, applicable to Indian country. Exempted from the operation of the section are two classes of individuals: (a) Indians who have committed offenses against the person or property of another Indian, and (b) Indians who have committed offenses in Indian country for which they have been punished by the local law of the tribe. This provision can be traced back more than one hundred years to the Act of March 27, 1854, ch. 26, § 3, 10 Stat. 270. *See Ex parte* Crow Dog, *supra,* 109 U.S. at 558. The fact that these two exceptions extend only to situations where the crime was committed by Indians is alone a strong indication that Congress considered the residual jurisdiction of tribal courts to be limited to such offenders.[10]

This inference is greatly strengthened by section 1153. That section provides an exception to the exception in section 1152 by providing that where an Indian commits, against the person or property of another Indian, one of several major listed crimes, exclusive jurisdiction for the offense lies in federal court. Sam v. United States, 385 F.2d 213, 214 (10th Cir. 1967); *see* Felicia v. United States, 495 F.2d 353, 354 (8th cir.), *cert. denied,* 419 U.S. 849 (1974). It seems extremely anomalous that Congress would provide for exclusive jurisdiction in the federal courts for major offenses committed by Indians, but permit tribal courts to try non-Indians for those same major offenses.[11] The more reasonable inference, of course, is

[10] I find the majority's explanation of why this section protects Indians from double jeopardy but not non-Indians unpersuasive. Majority opinion, note 1. Far from being a simple oversight, it is, I think, strong evidence that the prevalent assumption at that time on the part of Congress was that Indian courts simply were not entitled to try and punish non-Indians. Moreover, the fact that Congress failed to correct any such "oversight" for more than 100 years is indicative that the wording accurately reflects the congressional intent.

[11] The Indian Civil Rights Act, 25 U.S.C. §1302(7), limits the penalty that may be imposed by a tribal court to 6 months imprisonment and

that Congress withdrew jurisdiction from the tribal courts to try major offenses only when these were committed by one Indian against another because it knew that tribal jurisdiction extended no further than this class of offenders.[12]

Section 1165 of title 18 prohibits unauthorized entry upon Indian land for the purpose of hunting or fishing. The legislative history of that provision indicates a clear congressional understanding that tribal jurisdiction does not extend to non-Indians. And it was precisely this lack of power by Indian tribes to punish non-Indians that formed the rationale for enactment of the section.

> The problem confronting Indian tribes with sizable reservations is that the United States provides no protection against trespassers comparable to the protection it gives to Federal property as exemplified by title 18, United States Code, section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason*

a $500 fine. Section 1153, however, considerably antedates the 1968 Act, tracing its origins to the Indian Appropriation Act of 1885, c. 341, §9, 23 Stat. 385. *See* People v. Kagama, 118 U.S. 375 (1886).

[12] 18 U.S.C. §1160 provides some additional support for the proposition that Congress never assumed that Indian tribunals could exercise jurisdiction over non-Indians. That section provides for compensation for Indian victims of crimes committed by white men. In certain instances such compensation is to be paid by the United States treasury. The section provides, however, that no such compensation is to be paid where the victim "or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence." Although the passage discusses possible action by the Indian nation as a whole, no mention is made of the possibility of exacting restitution or retribution in tribal court. While, of course, this section is not directly applicable to the problem we are considering, I find it indicative of the congressional attitude toward the possibility that non-Indians might be subjected to the scrutiny of an Indian court. This section can be traced back to the Indian Trade and Intercourse Act of 1802, ch. 13, §4, 2 Stat. 141, which contains the quoted language virtually verbatim. The fact that Congress has left this portion of the section unchanged while repeatedly amending other parts is indicative that failure to refer to the possibility of tribal court justice was not inadvertent.

> *of the fact that Indian tribal law is enforcible against Indians only; not against non-Indians.*
>
> . . . .
>
> *Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges.* Further, there are no Federal laws which can be invoked against trespassers.
>
> . . . .
>
> The committee has considered this bill and believes that the legislation is meritorious. The legislation will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of their property.

S. REP. No. 1686, 86th Cong., 2d Sess. 2–3 (1960) (emphasis added). *Accord*, Letter from Roger Ernst, Assistant Secretary of the Interior, to Senator Celler, Chairman of the Senate Judiciary Committee, Feb. 13, 1958, *id.* at 3, 4.

I am persuaded that Indian tribal courts were not intended to have jurisdiction over non-Indians. Although Congress has never explicitly so provided, it has repeatedly acted in accord with this premise. Unlike the majority, I would not require an express congressional withdrawal of jurisdiction. A presumption in favor of any inherent, general jurisdiction for tribal courts is wholly inconsistent with the juridical relations between the federal government and the Indian tribes that has existed for the past 100 years. Viewing tribal courts in their historical and cultural context, in light of the fact that virtually no white man appears to have been tried by an Indian tribunal in the past century, congressional silence on this point can hardly be viewed as assent.

Since I do not believe that Indian courts have jurisdiction over the appellant, I would not reach his claim that he would be denied due process were such a trial to take place. I would grant the writ of habeas corpus.

/s/ _____
Anthony M. Kennedy
United States Circuit Judge

DISTRICT COURT—PETITION FOR WRIT OF HABEAS CORPUS

Filed Nov. 6, 1974

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DANIEL B. BELGARDE,
Petitioner,
vs.
ROGERS C. B. MORTON, Secretary of Interior of the United States; SUQUAMISH INDIAN TRIBE; CECILIA M. HAWK, Judge, Suquamish Tribal Court; and GRACE DUGGAN, Judge, Suquamish Tribal Court.
Respondents.

NO. C74-6835

PETITION FOR WRIT OF HABEAS CORPUS

DANIEL B. BELGARDE, Petitioner, represented by his attorney, PHILIP P. MALONE, petitions the Court for a Writ of Habeas Corpus to test the legality of his detention by the Respondents and in determining the facts to enter an Order declaring the Respondents to have acted without jurisdiction and authority over the Petitioner contrary to law. The Petition shows the following:

I. JURISDICTION

The Court has jurisdiction of this matter in accordance with any one or all of the following authorities:

1. U.S. Constitution, Article I, Section 9, Clause 2;
2. 28 USCA 2241(c) (Habeas Corpus):
   "(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
   (3) He is in custody in violation of the Constitution of laws or treaties of the United States."
3. 25 USCA 1303 (Indians):
   "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

II. FACTS

1. The Petitioner is a non-Indian of 21 years of age. At all times herein mentioned the Petitioner resided in the unincorporated town of Suquamish, Kitsap County, Washington.

2. The town of Suquamish, Washington is located within the boundaries of the Port Madison Indian Reservation. There is no community of Indians living on the Port Madison Indian Reservation. The Port Madison Indian Reservation consists of approximately 7276 acres of which approximately 63% thereof is owned in fee simple absolute by non-Indians and the remainder 37% is Indian owned lands subject to the trust status of the United States, consisting mostly of unimproved acreage upon which no persons reside. Residing on the reservation is an estimated population of approximately 2928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe. Within the reservation are numerous public highways of the State of Washington, public schools, public utilities and other facilities in which neither the Suquamish Indian Tribe nor the United States has any ownership or interest. In support of the data there is attached to this Petition the following:

Exhibit 1—Map of Port Madison Reservation
Exhibit 2—Affidavit of Martha F. George
Exhibit 3—Affidavit of Robert J. Smiley

3. The Suquamish Indian Tribe is an Indian Tribe organized under the Indian Re-organization Act of the United States, June 18, 1934 (48 Stat. 984), which does not authorize the Suquamish Indian Tribe to exercise any executive, legislative or judicial power over a non-Indian or non-Indian lands within the Port Madison Indian Reservation.

4. The Suquamish Indian Tribe has a Constitution and Bylaws adopted on November 16, 1964, pursuant to a vote only of its Indian members in which 56 voted of an alleged Indian membership of 112. It was approved by the United States under the authority of the Secretary of Interior pursuant to the Indian Re-organization Act of 1934, *(Supra.)*. In accordance with that Constitution membership is limited to enrolled persons of Suquamish Indian blood as of January 1, 1942, children born of those mem-

bers and persons having one-eighth Suquamish Indian blood. No person of non-Indian Suquamish Indian blood or not a child of a member can belong to the tribe, participate in the election of its governing body, or have a vote or determination in the passage of its laws and ordinances. The governing body of the tribe is the Suquamish Tribal Council.

5. In 1973, and subsequent to that time, the Suquamish Indian Tribe and the Suquamish Tribal Council for the first time asserted police powers of a sovereign over its members and all persons on the Port Madison Indian Reservation. It promulgated a "Law and Order Code", the violations or publication, of which the Petitioner was charged, without public notice, thereof, and without representation or consent of non-Indians and persons not members of the tribe residing on the Port Madison Indian Reservation. The Suquamish Indian Tribe has hired persons of Indian blood only as police officers, appointed members of the tribe as judges, acquired funds and property for the administration and enforcement of its laws from the United States for the payment of salaries, the purchase of property, and the arrest and incarceration of non-Indian persons violating tribal laws on the Port Madison Indian Reservation. Such police officers and judges affected the arrest and incarceration of the Petitioner as hereinafter stated.

6. The Secretary of Interior, acting through officers of the Bureau of Indian Affairs, has made contracts with the Suquamish Indian Tribe, supplied funds and property of the United States, and furnished facilities and training for the arrest by Indian police officers, the trial by tribal judges, and the detention and imprisonment of non-Indian persons violating tribal laws on the Port Madison Indian Reservation contrary to the Constitution of the United States and the laws of the Untied States as hereinafter stated. By such actions, contracts, funds and supplies, the Petitioner's freedom and custody has been and is continued to be detained by orders of the Suquamish Indian Tribe.

7. In the morning hour of approximately 2:00 o'clock A.M., Saturday morning, the 12th day of October, 1974, while driving his vehicle, a pickup truck carrying two passengers, Mark D. Oliphant and Brad Bray, on non-Indian land within the Port Madison Indian Reservation, in a

northerly direction on the public highway of Kitsap County, Washington, known as "Division Street", was forced to stop his vehicle by police officers of the Suquamish Indian Tribe, whose names are believed to be Wayne DeCoteau, Allen Jones and Carl Bigman. The vehicle of the Petitioner was forced to stop by one of the police vehicles being driven by one of those police officers immediately in front of the Petitioner's moving vehicle causing the Petitioner's vehicle to unavoidably collide with and into the side of the Indian police car. The other Indian police car came to a stop in the rear of the Petitioner's vehicle.

After blocking the vehicle of the Petitioner, one of the Indian police officers (believed to be Wayne DeCoteau) came out of the Indian police car that drove in front of the Petitioner's vehicle, and standing from a distance of less than twenty (20) feet in front of and to the left of the Petitioner's vehicle, pointed and fired a pistol held in his hands directly towards the Petitioner's vehicle and towards the face and view of the Petitioner and his passengers sitting in the seat of the truck, causing the Petitioner and his passengers great fear and apprehension of bodily injury whereby they submitted themselves to the Indian police officers without resistence. The Petitioner and the two passengers were immediately handcuffed by the Indian police officers. The Petitioner was forcefully shoved by one officer into the side of Petitioner's vehicle causing a dent in the side of his vehicle and injury to his person. The two passengers were released from custody at the scene by the Indian police.

The State of Washington police patrol officer arrived at the scene and a deputy sheriff of Kitsap County. Neither of said officers charged the Petitioner with any crime for violation of the laws of Washington and did nothing about the arrest and detention of the Petitioner by the Indian police. The actions of the Indian police and the authority claimed by the Suquamish Indian Tribe over offenses of non-Indians on the Port Madison Indian Reservation prevented the State Police and County Sheriff from enforcing the laws of the State of Washington and protecting the rights of the Petitioner under the laws of the State of Washington from the actions of the Indian police officers to which the Petitioner, as a citizen of the United States and the State of Washington, is entitled.

Thereafter in denial of the rights of the Petitioner as hereinafter stated, to be arrested and charged for crimes only of laws of the State of Washington and be protected by the rights of a citizen in the process of adjudications of those charges, the Indian police officers did take the Petitioner into custody to the tribal office in Suquamish and without having informed him of the charges of his arrest and detention and of any rights that he may have either under the Constitution of the United States, the laws of the United States, or the laws of the Suquamish Indian Tribe, did fill out forms each entitled "Temporary Order of Committment", each of which forms have already been signed prior to the above-stated incident by "Cecelia M. Hawk" and are attached and incorporated herein as:

Exhibit 4—Temporary Order of Committment
Exhibit 5—Temporary Order of Committment

The Petitioner was thereafter transported by two of the Indian police officers in a patrol car paid from funds of the United States to the City of Port Angeles Jail located a distance of approximately 60 miles from Suquamish and without Kitsap County and the Port Madison Indian Reservation. The Petitioner was incarcerated in the City of Port Angeles jail as a prisoner of the Suquamish Indian Tribe under a contract for holding said prisoners authorized by contract with the City of Port Angeles and the United States by the authority of the Secretary of Interior. Copies of the contracts made for the period April 15, 1974 to June 30, 1974 and July 8, 1974 are attached as:

Exhibit 6—Jail Contracts

The Petitioner was kept in the Port Angeles City jail in Clallum County, Washington, until 1:30 P.M., October 12, 1974, when bond was posted as accepted by Cecelia M. Hawk, Judge of the Suquamish Indian Tribe, subject to the freedom of the Petitioner further being detained thereafter by order of the Suquamish Indian Tribe to appear for trial before the Suquamish Indian Tribal Court.

Having to inform himself of the date to appear before the Suquamish Tribal Court, the petitioner appeared on October 18, 1974 at 7:30 P.M. with his attorney, Philip P. Malone, before the Suquamish Tribal Court held in the back half of a former barber shop, measuring approximately 8' x 10', not physically capable of handling a fair, free and open public trial or arraignment. Sitting at a desk

was the trial judge, Grace Duggan, who it is believed has little knowledge, training or practice in the law. The remaining part of the room was occupied by tribal police officers and persons prejudiced and openly hostile to the Petitioner and non-Indians opposed to the police authority of the Suquamish Indian Tribe over non-Indians.

Grace Duggan then read from a book, while requiring the Petitioner to stand in from of her desk, the Petitioner's rights, sections from the Law and Order Code, and the punishment for violation thereof of which the Petitioner was charged. The Petitioner does not know at the present time the sections of law of the Law and Order Code of which he is charged, since such code has neither been published or distributed to members of the non-Indian public on the Port Madison Indian Reservation. The Petitioner recalls from that hearing only that he has been charged with endangering the life of another and not "wreckless driving" as contained in Exhibit 4 and with destruction of "public property" not "private property" as contained in exhibit 5. The Petitioner has received no writing setting forth the charges alleged.

The Respondent, Grace Duggan, informed the Petitioner at the hearing of his rights to an attorney, his rights to trial now or later and the pleas that he could make in answer to the charges that she had read. Philip P. Malone gave notice that he was appearing as attorney for the Petitioner and was notified that no person could appear as attorney for a defendant before the Suquamish Tribal Court unless accepted by the "Chief Judge" and on having paid a fee to the tribal court. Grace Duggan was then informed by Philip P. Malone that this petition would be filed in this Court. Court was adjourned and the Petitioner's freedom continues to be detained subject to the order of Suquamish Tribal Court for a trial date unknown to the Petitioner at the present time.

It is believed that Grace Duggan is the "Chief Judge" of the Suquamish Indian Tribal Court.

III. LAW

1. The Petitioner is in the custody under or by color of the authority of the United States in accordance with the facts alleged because the President of the United States through the office of the Secretary of Interior, Bureau of

Indian Affairs has by policy, money, property and direction expressed or implied, authorized and paid for the detention, arrest, imprisonment and adjudication of the laws and orders of the Suquamish Indian Tribe as to non-Indian Petitioner, which are in violation of the Constitution of the United States, the laws of the United States and the laws of the State of Washington as hereinafter stated. 28 USCA 2241(c) (1).

2. The Petitioner is in the custody in violation of the Constitution of the United States, the laws of the United States and the Treaty of Point Elliott of 1855, (12 Stat. 927) and jurisdiction is in the Court in accordance with 28 USCA 2241(c) (2), in the following particulars:

> (a) The Suquamish Indian Tribe in accordance with Article 1 of the Treaty of Point Elliott did: ". . .cede, relinquish, and convey to the United States all their right, title and interest in and to the lands and country occupied by them. . ." Such land includes the land where the Petitioner was arrested. In Article IX of the treaty the tribe did: "acknowledge their dependence on the government of the United States." The land where the alleged offense occurred was on land within the Port Madison Indian Reservation no longer occupied by any Indians of the Suquamish Indian Tribe and therefore any power of Jurisdiction of the Suquamish Indian Tribe terminated as to offenses occurring on that land as to Indians and jurisdiction over such land as to offenses of non-Indians is not in the Suquamish Indian Tribe.
>
> (b) The United States Constitution by Article I, Section 8, Clause 3 (Regulation of Commerce), and by Article II, Section 2, Clause 2, (Treaty Making Power), delegated *exclusive power* to the United States Congress and to the President of the United States with the advice and consent of the Senate respectively to regulate commerce and make treaties with Indian tribes. The United States assumed exclusive jurisdiction of criminal offenses occurring within an Indian reservation by the Trade and Intercourse Act, 18 USCA 1152. The Constitution of the United States is the Supreme Law of the Land, which included the Port Madison Indian Reservation and therefore such power assumed is *exclusive*. U.S. Constitution Article VI. The assumption of jurisdiction by the Suquamish Indian Tribe over offenses of non-Indians on non-Indian land is in violation of those constitutional provisions and laws made pursuant to that authority on the Port Madison Indian Reservation which

> have been made exclusive by the exercise of constitutional powers of the Congress of the United States.
>
> (c) On August 15, 1953, the United States Congress acting under its power derived from the United States Constitution authorized the State of Washington to assume its exclusive jurisdiction over criminal offenses committed by or against an Indian in Indian Country situated within the State of Washington. Pub. Law 83–280 (67 Stat. 588 (1953)). Responding to that law, the State of Washington legislature did pass the following:
>
> Enacted Laws 1957, Ch. 240, Sec. 1, pg. 949, which reads: "The State of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Pub. Law 280, 83rd Congress, 1st Session)."

The Enacted Laws of 1957 provided that such jurisdiction of the State of Washington would be assumed by proclamation of the Governor of the State of Washington:

> "Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the State of Washington to the extent authorized by federal law. . ." RCW 37.12.020.

On the 15th day of May, 1958, Governor Rosellini *having received such consent from the Suquamish Indian Tribe* issued a proclamation in accordance with that 1957 legislation reading:

> "THE CRIMINAL AND CIVIL JURISDICTION OF THE STATE OF WASHINGTON SHALL APPLY TO THE SUQUAMISH INDIAN PEOPLE, THEIR RESERVATION, TERRITORY, LANDS AND COUNTRY, AND ALL PERSONS BEING AND RESIDING THEREIN."

In 1963 the laws of the State of Washington of 1957, were amended by its legislature—those laws of 1957 being the assumption of criminal and civil jurisdiction authorized by the Washington legislature to be assumed with consent of Indian tribes to the governor by the governor's proclamation. Such amendment did not affect the Port Madison Indian Reservation since the Suquamish Indian Tribe had

consented and Governor Rosellini had issued a proclamation in accordance with the law passed by the legislature in 1957. *Supra.*

The 1963 amendment renounced jurisdiction assumed only as to tribes that *had not consented* to jurisdiction prior to 1963 by not applying such jurisdiction to: "Indians when on their tribal lands or alloted lands within an established Indian reservation and held in trust by the United States. . ." and as to those tribes that had not consented, the State of Washington maintained its exclusive jurisdiction as to eight items, number (8) of which reads:

> "Operation of motor vehicles upon the public streets, alleys, roads and highways: Provided further, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963, shall remain subject to state civil and criminal jurisdiction as if Chapter 36, Laws of 1963 had not been enacted."

In August 26, 1971, Governor Daniel J. Evans, issued a proclamation without authority of the legislature of the State of Washington declaring Governor Rosellini's Proclamation of the 15th of May, 1958, "null and void", and proclaimed that any jurisdiction exercised by the State of Washington over the Suquamish Port Madison Indian Reservation, except as provided under Chapter 36, Laws of 1963 (RCW 37.12.010–37.12.060), is retroceded to the United States. Exhibit 7 attached and incorporated herein is "Governor Evans' Proclamation 1971."

Since the Proclamation of Governor Evans was qualified in his proclaimed retrocession as to the laws of 1963 and the laws of 1963 provided that the 1957 laws passed by the legislature remain in effect as to tribes consenting, no civil and criminal jurisdiction was retroceded by that proclamation of Governor Evans.

Further, even if the retrocession by the proclamation of Governor Evans was law, excluded from such retrocession was civil and criminal jurisdiction as to offenses regarding the operation of motor vehicles upon public highways. RCW 37.12.010(8), *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P. 2d 590 (1969).

The retrocession of the proclamation of Governor Evans in 1971 was made without authority of the Constitution of the State of Washington, wherein the authority of the Governor does not include the right to repeal laws and

proclamations made in pursuant to the legislature of the State of Washington. Wash. State Constitution, Article III. The passage and repeal of laws of the State of Washington is a legislative function in which the Governor can only participate by a veto thereof. *Supra.*, Art. III, Sec. 12; Art. I, Sec. 1 & Sec. 18. It may therefore be assumed that the action of Governor Evans by issuing the proclamation of 1971 was contrary and in violation of the constitution of the State of Washington. At the same time it is noted that the laws of Congress in 1968 authorizing a state to retrocede the criminal jurisdiction that it has assumed specifically by the laws of 1953 did not affect any cession made by the United States prior to the 1968 law which repealed the 1953 law. Pub. Law 90–384, title IV, sec. 403, Apr. 11, 1968, 82 Stat. 79, 25 USCA 1323.

Therefore the Respondents were without authority and jurisdiction to have the Petitioner arrested, detained and imprisoned and subject to the loss of his freedom by laws and orders of the Suquamish Indian Tribe and the aid and assistance of the United States, because the State of Washington has assumed exclusive jurisdiction to offenses of non-Indians occurring on the Port Madison Indian Reservation as provided in the proclamation of Governor Rosellini and the laws of the legislature of 1957 to which the Suquamish Indian Tribe has consented.

(d) The Petitioner is denied the full and equal benefit of the laws within the jurisdiction of the United States within the Port Madison Indian Reservation that are enjoyed by a white citizen of the State of Washington when on a public highway and is not subject to like punishment, pains, penalties, and exactions and no other, by laws and orders of the Suquamish Indian Tribe in violation of the 14th Amendment of the United States Constitution and in violation of the Civil Rights Act, 42 USCA 1981, which reads:

> Equal rights under the law:
> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The benefits of the Suquamish Indian Tribe as to the Petitioner are not full and equal to that of the laws of the State of Washington wherein he resides in the following particulars:

1. The Petitioner is a citizen of the State of Washington and entitled to vote and be represented in a republican form of government wherein the laws that are made by it are made in pursuant to the consent of the governed and the first ten amendments to the Constitution of the United States are part of that law for his protection in the legislation, execution and adjudication of those laws. The Petitioner because of his race is denied membership in the Suquamish Indian Tribe; the constitution of the United States is not part of law of the Suquamish Indian Tribe, and the Petitioner does not have the benefit of the Bill of Rights under the laws of the tribe. The legislative, executive, and judicial functions of the tribal government are not separated. The tribal government is for the benefit of its members only and not for the benefit of all residents of the Port Madison Indian Reservation.

2. The laws of the State of Washington are published and made known to the Petitioner. The laws of the Suquamish Indian Tribe have not been published and are not made known by the tribe to non-Indians.

3. The Petitioner will not receive a fair trial in a Suquamish Indian Tribal Court by his peers for the judges are not elected but appointed by the tribe from persons of Indian ancestry only and non-Indians will not serve as jurors in the trial of cases.

4. The Petitioner is not entitled to an attorney who is qualified to practice law in the State of Washington of his choice in the trial of case, but only entitled to an attorney that has been approved by the "Chief Judge".

5. The fines, punishments and exactions of the laws of the tribe are different from and unlike the fines, punishments and exactions of the laws of the State of Washington.

6. The Court room and facilities are not adequate for fair, open and public trial. The judges and the Suquamish Tribal Court are prejudiced and hostile to the Petitioner as a non-Indian.

7. The income paid by the United States and the payments received by police officers and judges of the tribe is dependent upon those powers being exercised by them over all persons within the Port Madison Indian Reservation. Therefore the arrest, trial and conviction of the Petitioner is a foregone conclusion and he shall not

therefore receive a fair trial before the Suquamish Indian Tribal Court.

8. The laws passed by the Suquamish Tribe and applied to the Petitioner are not made in due process of law in that the Constitution of the Tribe does not authorize the Tribe to enact such laws, establish a police force and courts and adjudicate cases as to non-Indians. The laws of Washington, the establishment of a police force and courts are in accordance with its written constitution.

(e) The laws and orders of Suquamish Indian Tribe that resulted in the arrest, imprisonment, detention and custody of the Petitioner subject to the orders of the Suquamish Tribal Court and those orders thereof are in violation of the Indian Civil Rights Act, Pub. Law 90–284, Title II, Sec. 201, Apr. 11, 1968, 82 Stat. 77, 25 USCA 1302, which reads as follows:

"No Indian tribe in exercising powers of self-government shall—

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

The particulars set forth in paragraph (d) hereof are incorporated in this paragraph.

WHEREFORE, the Petitioner requests the Court in accordance with its jurisdiction stated in this Petition the privilege of the Writ of Habeas Corpus to test the legality of the arrest, restraint and detention of the Petitioner by each of the Respondents, acting individually and/or in concert together by issuing an order as follows:

1. An Order to Show Cause directed to each of the Respondents containing the following: (28 USCA 2243)

(a) Require each of the Respondents to return an answer to each of the allegations set forth in this petition and

matters set forth in the affidavits attached herein by a date certain and not less than twenty (20) days from the date said order is issued or the allegations shall be deemed true and correct by the Court;

(b) That the United States Marshall be directed to serve this Petition and the Order to Show Cause upon each of the Respondents.

2. After the return date to the Order to Show Cause hold hearings as the Court may determine to establish the facts and law and thereafter enter judgment thereon and issue a Writ of Habeas Corpus releasing the Petitioner from the acts of detention and restraint against his liberty under the laws of the Suquamish Indian Tribe and its orders against the Petitioner made pursuant thereto as law and justice require.

/s/ Daniel S. Belgarde

DANIEL B. BELGARDE, Petitioner

(JURAT OMITTED IN PRINTING)

DISTRICT COURT—EXHIBIT 4 OF PETITION FOR WRIT OF HABEAS CORPUS: TEMPORARY ORDER OF COMMITMENT DATED OCTOBER 12, 1974; VIOLATION OF SECTION 44, CHAPTER III OF THE SUQUAMISH TRIBAL LAW AND ORDER CODE

Filed Nov. 6, 1974

IN THE SUQUAMISH TRIBAL COURT OF THE PORT MADISON INDIAN RESERVATION

SUQUAMISH TRIBAL COURT

Suquamish Indian Tribe, *Plaintiff* *vs.* Dan D. Belgarde, *Defendant*	TEMPORARY ORDER OF COMMITMENT

TO THE KEEPER OF THE JAIL:

You are hereby ordered by the Suquamish Tribal Court to take into your custody Dan D. Belgarde, Defendant charged with the offense of destruction of private property in violation of Section 44, Chapter III of the Suquamish Tribal Law and Order Code and hold said defendant until such time he has posted $100.00, bail or brought before Court to show cause for trial.

Dated: _____ Cecelia M. Hawk
Judge, Suquamish Tribal Court
Port Madison Indian Reservation

Dated: _____ _____
Signature of Office in Charge
Suquamish Tribal Police

DISTRICT COURT—EXHIBIT 5 OF PETITION FOR WRIT OF HABEAS CORPUS; TEMPORARY ORDER OF COMMITMENT DATED OCTOBER 12, 1974; VIOLATION OF SECTION 59, CHAPTER III OF THE SUQUAMISH TRIBAL LAW AND ORDER CODE

Filed Nov. 6, 1974

IN THE SUQUAMISH TRIBAL COURT OF THE PORT MADISON INDIAN RESERVATION

SUQUAMISH TRIBAL COURT

SUQUAMISH INDIAN TRIBE,
Plaintiff
vs.
DAN D. BELGARDE,
Defendant.

TEMPORARY ORDER OF COMMITMENT

TO THE KEEPER OF THE JAIL:

You are hereby ordered by the Suquamish Tribal Court to take into your custody Dan D. Belgarde, Defendant, charged with the offense of wreakless driving in violation of Section 59, Chapter III of the Suquamish Tribal Law and Order Code and hold said defendant until such time he has posted $300.00 bail or brought before Court to show cause for trial.

Dated: 10/12/74

Cecelia M. Hawk
Judge, Suquamish Tribal Court
Port Madison Indian Reservation

Dated: _____

_____
Signature of Officer in Charge
Suquamish Tribal Police

DISTRICT COURT—EXHIBIT 6 OF PETITION FOR WRIT OF HABEAS CORPUS: AGREEMENT BETWEEN CITY OF PORT ANGELES AND UNITED STATES BUREAU OF INDIAN AFFAIRS DATED APRIL 15, 1974

Filed Nov. 6, 1974

(Caption Omitted in Printing)

THIS AGREEMENT made and entered into by and between the City of Port Angeles (Police Department) through its duly authorized commissioner, hereinafter referred to as a party of the first part, and the Bureau of Indian Affairs through its contracting officer, hereinafter referred to as the party of the second part.

NOW, THEREFORE, WITNESS

That the party of the first part shall care for prisoners placed in the custody of officers and for and in consideration of this service (which shall include room and board) the party of the second part will make payment to the City of Port Angeles, Washington, at the rate of $3.75 per day for the period beginning July 1, 1974 and ending June 30, 1975.

It is understood and agreed that payment for emergency medical and dental care of the prisoner sentenced by or being held for trial by the Courts will not be the responsibility of the party of the first part.

It is understood and agreed that the prisoners who have served their full time will not be released except upon written orders of the tribal court and their officers.

It is understood and agreed that prisoners committed to the Port Angeles City Jail will be subject to the same rules and regulations required of the other prisoners to be observed in said jail.

It is understood and agreed that payment will be made for this service at the end of each month of presentation by the Chief of Police of a proper invoice to the Bureau of Indian Affairs, Western Washington Agency, 3006 Colby Avenue, Federal Building, Everett, Washington 98201.

It is further understood and agreed that this agreement shall be for the above period with the option to renew subject to availability of funds. This agreement may be terminated upon thirty (30) days written notice to the other,

This agreement may be modified in writing upon mutual consent to both parties of the contract.

It is further understood and agreed that this agreement can be terminated by either party on thirty (30) days written notice.

This agreement is subject to the attached general provisions and Witness whereof both parties have hereunto set their hands on the date written above.

UNITED STATE OF AMERICA	HAL PUDDY
(Contracting Officer) A. LaCourse Area Property & Supply Officer	(Signer authorized to sign) Date: July 8, 1974 Hal Puddy, City Manager (Name & Title of Signer)
Name & Title of Signer	(Type or Print)

CONTRACT #14-20-0500-4162

DISTRICT COURT—ORDER OF U.S. DISTRICT COURT REFERRING CASE TO U.S. MAGISTRATE

Filed Nov. 12, 1974

(Caption Omitted in Printing)

It is ORDERED that this matter is referred to the United States Magistrate pursuant to Section 636, Title 28, United States Code, and Local Rule MR 28.

DATED this 11 day of November, 1974.

UNITED STATES/DISTRICT JUDGE

DISTRICT COURT—RETURN OF SUQUAMISH RESPONDENTS ON PETITION FOR FOR WRIT OF HABEAS CORPUS

Filed Jan. 31, 1975

(Caption Omitted in Printing)

The Suquamish Indian Tribe, Cecelia M. Hawk and Grace Duggan, judges of the Suquamish Tribal Court, by and through their attorneys ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT, and Barry D. Ernstoff, hereby respond to the Petition for Writ of Habeas Corpus pursuant to the Order to Show Cause issued December 13, 1974.

1. FACTS.

At approximately 10:00 P.M., October 11, 1974, Suquamish Tribal Chief of Police, Carl Big Man, reported to the Kitsap County Sheriff's Office that a vehicle was speeding dangerously through the streets of the town of Suquamish. No action was taken by the Sheriff's Department, and the vehicle continued to speed dangerously through the streets of the town. At 11:45 P.M., Tribal police officers Wayne P. DeCoteau and Alan Jones and Chief Big Man began pursuit of the 1973 black Ford pickup. (Copies of the Suquamish Tribal Police reports are attached hereto as Exhibit A). The officers signalled the vehicle to stop by turning on their blue lights and sirens, but the vehicle did not respond. The officers observed the vehicle speeding on South Street in a reckless manner and continued to follow the vehicle in hot pursuit.

The officers finally managed to block the road in front of the vehicle as it slowed down almost to a stop on Division Street, around the corner from South Street, at approximately 1:35 A.M. Chief Big Man proceeded to open the door of one Tribal police car in front of the vehicle, when the vehicle sped up and rammed into the right door of the Tribal police car which had blocked the road in front of the vehicle. He was injured by the impact of the vehicle hitting the police car.

The driver of the vehicle then backed it up and attempted to flee. Chief Big Man ordered Officer DeCouteau to fire a warning shot over the vehicle. This was done, and the vehicle finally stopped, and the driver, Petitioner Daniel Belgarde, was detained.

The Tribal police officers then called the Kitsap County Sheriff's Office to report the incident. At 2:20 A.M., an officer of the Sheriff's Office and a state patrolman arrived and conducted an investigation. Both the state and county officers refused to take any further legal action, and Petitioner was then arrested and transported to the Port Angeles City Jail, which contracts as the holding facility for the Suquamish Indian Tribal Court.

Petitioner was charged with reckless driving and destruction of Tribal property under the Suquamish Tribal Law and Order Code and was booked the next afternoon before the Suquamish Tribal Court and bail was posted.

On October 18, 1974, Petitioner appeared at Suquamish Tribal Court for his arraignment with his attorney, who informed the Tribal Court that this action would be commenced.

2. THE SUQUAMISH TRIBE AND THE TRIBAL COURT HAVE JURISDICTION OVER PETITIONER REGARDING THE OFFENSES FOR WHICH HE WAS CHARGED.

2.1 Validity of Tribal Court Jurisdiction.

In this petition, Petitioner has made a number and a variety of allegations regarding the Suquamish Indian Tribe and its jurisdiction over non-Indians. First, the Tribe has reason to believe that the Petitioner is, in fact, an Indian, though not a member of the Suquamish Indian Tribe. A recent Suquamish Elementary School census prepared for the Bureau of Indian Affairs lists two siblings of Petitioner as Indians who qualify for funds under the Johnson-O'Malley program, under which federal funds are available for special programs for Indians in local schools (See Affidavit of Charles Deam, attached hereto as Exhibit B).

Petitioner's allegations regarding the sovereignty of the Suquamish Indian Tribe, the boundaries of the Port Madison Indian Reservation, the Treaty of Point Elliott, and the jurisdiction of an Indian tribe over offenses committed by non-Indians on the Reservation, were all before this court in a previous case involving Suquamish Tribal jurisdiction, *Oliphant v. Schlie*, W.D. Washington, Cause No. 511–73C2. In a memorandum opinion, dated April 5, 1974, Judge Morell E. Sharp upheld the jurisdiction of the Suquamish Indian Tribe over non-Indians committing criminal offenses occurring on land held in trust by the

United States government for the benefit of Indians on the Port Madison Indian Reservation. A copy of the Memorandum Opinion is attached as Exhibit C. Most of the arguments being raised by Petitioner in this cause were considered and rejected by Judge Sharp in the previous case. Petitioner has raised certain issues not previously litigated in the *Oliphant* case which will be dealt with below.

2.2 Requirement That Attorney Be Admitted to Suquamish Tribal Court Bar.

Under Section 15 of Article 10 of the Suquamish Law and Order Code, all counsel who wish to be admitted to practice in the Suquamish Tribal Court may be admitted to practice upon motion to Chief Judge of the Court. The Code provides that:

> Any person who is a member in good standing of the Bar of any state of the United States or the District of Columbia, is of good moral character, and demonstrates to the Court the thorough knowledge of this Code, the rules of the Suquamish Tribal Court, and federal laws and regulations applicable to the Suquamish Tribe and some knowledge of the culture and traditions of its members, is eligible to apply for admission to general practice in this court. . . . .

Petitioner has not demonstrated that a requirement that his attorney in Tribal Court know the rules, laws, and customs of that Court is so burdensome as to be denial of a civil right under the Indian Civil Rights Act, 25 U.S.C. §1302. If such were the case then every state in the nation which requires passing a bar examination would be subject to the same attack.

2.3 Fairness of Trial.

Petitioner's general allegations that he cannot receive a fair trail because of the hostility of the judges of the Suquamish Tribal Court do not sustain his application for a writ of habeas corpus. The procedures and rules of the Suquamish Tribal Court and its officers have previously been approved after similar allegations in the *Oliphant* case. The judges of the court are elected by the Tribe at large and have undergone intensive training with the National Tribal Judges' Association and at a special Indian tribal judge course at the University of Washington Law School taught by Professor Ralph Johnson.

Chief of Police Carl Big Man is a Crow Indian who attended the Indian Police Academy in Roswell, New Mexico, in 1969. He served as a tribal police officer on the Crow Indian Reservation and continued in-service police training by the Bureau of Indian Affairs through 1972. In 1972, and in 1973, he served as probation and parole officer for the Cour d'Alene Indian Reservation and has served as Chief of Police of the Suquamish Tribe since January, 1974. Officers Jones and DeCoteau received police training in law enforcement at Olympic Junior College in Bremerton. The Tribal law enforcement program, including police and courts, operates under grants from the Bureau of Indian Affairs Law Enforcement Division and the Law Enforcement Assistance Administration (L.E.A.A.).

Petitioner has cited no specific averments beyond his general claim of lack of due process. Such general claims do not support a petition for habeas corpus relief.

2.4 Validity of Retrocession of Jurisdiction From the State of Washington.

Petitioner contends that the proclamation of Governor Daniel J. Evans, dated August 26, 1971, proclaiming the retrocession of criminal and civil jurisdiction over the Port Madison Reservation from the State of Washington back to the United States was invalid. He argues that the Governor acting alone does not have the power to repeal or retrocede such jurisdiction, and that therefore jurisdiction was not retroceded.

Any alleged improper gubernatorial action regarding this matter is of no consequence on the validity of such retrocession. In 1968, Congress passed P.L. 90-284, which, at Sec. 403 of Title IV (82 Stat. 79, 25 U.S.C. §1323) authorized the United States to accept a retrocession of jurisdiction. By Executive Order No. 11435 (November 21, 1968, 33 F.R. 17339), the President designated the Secretary of Interior to accept retrocession of jurisdiction by a state, providing that acceptance of such retrocession shall be effected by publication in the Federal Register of a notice specifying the jurisdiction retroceded and the effective date of the retrocession.

On April 14, 1972, retrocession of jurisdiction over the Port Madison Indian Reservation and the Suquamish Indian Tribe was accepted by the United States from the State of Washington, 37 F.R. 7353 (1972) (Attached hereto as Exhibit D). At the time of acceptance of the retroces-

sion by the United States, any irregularities in the state procedures requesting such retrocession became irrelevant. In *Omaha Tribe of Nebraska v. Walthill*, 335 F. Supp. 823 (D. Neb. 1971), *affirmed*, 460 F.2d 1327 (1972), *cert. denied*, 409 U.S. 1107 (1973), the court held that failure of Nebraska's legislature to present to the governor a resolution purporting to retrocede criminal jurisdiction, thus violating Nebraska law, had no effect whatsoever upon the legal validity of the retrocession where the retrocession was accepted by the Secretary of Interior in the appropriate manner. The court concluded that the State of Nebraska failed to follow its own legal procedures but that the important question was whether the state resolution was valid under federal law, not state law. The court concluded that the retrocession resolution was valid under federal law, pointing out that the Secretary of Interior was not authorized to investigate the procedural or technical validity of every notice he received:

> . . . [o]nce the Secretary received from the state officials what appeared to be an official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute.

334 F. Supp. at 832.

This analysis was reaffirmed in *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971). That court came to the same conclusion as the court in *Omaha Tribe, supra*, citing *Leser v. Garnett*, 258 U.S. 130, 66 L. Ed. 505 (1922), in which the United States Supreme Court applied federal law to a determination of the effect of the invalidity under state law of the ratification by two state legislatures of the Nineteenth Amendment to the United States Constitution. In *Leser*, the Supreme Court held that once the Secretary was notified of ratifications by official notice, it was conclusive upon him, and, being certified to by his proclamation, it was conclusive upon the courts. The court in *Brown, supra*, noted that:

> The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action, are all factors to be considered and lead the Court to the conclusion that the federal interpretation of the effectiveness of state action triggering the reassertion of federal jurisdiction is and was controlling.

334 F. Supp. at 541.

Thus the acceptance by the Secretary of Interior of the retrocession of jurisdiction over the Suquamish Indian Tribe of the Port Madison Indian Reservation was a determination by the federal government that the requirements of its laws had been met and retrocession therefore was accomplished, despite any possible invalidity of the governor's actions.

2.5 Validity of Arrest on Non-Trust Land for "Reckless Driving" on Trust Land.

Petitioner was charged in Suquamish Tribal Court with the offense of reckless driving in violation of the Suquamish Law and Order Code. If trial had been held in Suquamish Tribal Court, the Tribe would have attempted to prove that Petitioner drove recklessly in violation of Tribal law on South Street as described above. South Street is a dirt road located on Government Lot 3 which is held by the United States government in trust for the Suquamish Indian Tribe and was the subject of the litigation in *Oliphant, supra*. A copy of a letter and report by the Office of the Solicitor of the United States Department of Interior regarding the status of South Street is attached hereto as Exhibit E.

After pursuing Petitioner driving recklessly on South Street, the Tribal officer, in hot pursuit, arrested Petitioner two blocks away, off the Tribal trust land. Under the common law doctrine of "hot pursuit", the Tribal police officer had the right to pursue Petitioner directly off trust land after observing the commission of an offense on the trust land and to arrest Petitioner on Division Avenue. There is no question but that Division Avenue, where Petitioner was arrested, is within the exterior boundaries of the Port Madison Indian Reservation.

In addition, the Suquamish Tribal Court clearly has jurisdiction over Petitioner for the offense committed under the doctrine that when a person accused of an offense is held under valid process in the proper forum, such detention is not rendered invalid by the alleged illegality of the events which preceded, or which made the detention physically possible. 21 Am. Jur. 2d, *Criminal Law* §381. There is nothing in the Constitution, treaties, or laws of

the United States which exempts an offender from trial and punishment even though brought from another state in abuse of legal process. *Lascelles v. Georgia*, 148 U.S. 537.

Thus, even if it is held that for some reason Tribal police did not have the right to arrest Petitioner on Division Avenue, there is no question but that the Tribal Court has jurisdiction over Petitioner for an offense committed on trust land so long as Petitioner has appeared before the Tribal Court for a legitimate Tribal offense.

2.6 Validity of Jurisdiction Regarding "Destruction of Public Property".

Petitioner was charged with "destruction of public property" (Tribal property) because, after slowing his vehicle down, he intentionally rammed into the side of the Tribal police car, causing injury to Chief Big Man and great property damage to the Tribal vehicle. This damage was intentionally done to the Tribal vehicle by Petitioner while the Tribal vehicle was in pursuit of Petitioner after Petitioner committed the offense of reckless driving on South Street.

The incident occurred on a public road within the exterior boundaries of the Port Madison Indian Reservation and not on land owned by Petitioner. Neither the state nor county government expressed any interest in asserting its jurisdiction over Petitioner for any offense, thereby implying that only tribal interests were involved. As Judge Sharp found in *Oliphant*, (Memorandum Opinion at page 5), an Indian tribe always had the power to enact laws pertaining to non-Indians and to confer upon its Tribal courts the jurisdiction over the person of non-Indians unless such jurisdiction has been expressly limited by the acts of the United States government. Petitioner can point to no law and no decision of a court which holds that the United States government has taken from the Suquamish Indian Tribe jurisdiction over offenses committed within the exterior boundaries of the Port Madison Indian Reservation on non-trust land.

On January 21, 1975, the United States Supreme Court issued its decision in *United States v. Mazurie*, No. 73–1018. In that case, the Supreme court upheld the delegation by Congress to an Indian tribe of the power to regulate the sale of liquor within the boundaries of its reservation. The case involved a bar located on non-trust land

on the Wind River Reservation in Wyoming. The case points out that for purposes of determining jurisdiction over offenses occurring within "Indian country", there is no difference between trust and non-trust land. While that case concerned an express delegation of a power by Congress, the court commented extensively on the fact that Indian tribes have inherent powers over non-Indians within the exterior boundaries of their reservations, not dependent upon Congressional delegations of power:

> This Court has recognized limits on authority of Congress to delegate its legislative power. *Panama Refining Co. v. Ryan*, 203 U.S. 388 (1935). Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–322 (1936). Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515, 557 (1832); they are a 'separate people' possessing 'the power of regulating their internal and social relations. . . .' *United States v. Kagama*, 118 U.S. 375, 381–382 (1886); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 173 (1973).
>
> Cases such as *Worcester*, *supra*, and *Kagama*, *supra*, surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private voluntary organizations,' and they thus undermine the rationale of the Court of Appeals' decision.

Ship Opinion at 12.

In *Mazurie*, the non-Indians involved complained, as does Petitioner, of the fact that they would be subject to Tribal jurisdiction while being unable to become members of the Tribe or to participate in Tribal government. The court rejected that argument, holding:

> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by the Court's opinion in *Williams v. Lee*, 358 U.S. 217 (1959). In holding that the authority of tribal courts could extend over non-Indians insofar as con-

cerned their transactions on a reservation with Indians, we stated:

> 'It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. [Citations omitted.] The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock*, 187 U.S. 552, 564–566.'

358 U.S. at 223.

For the foregoing reasons the judgment of the Court of Appeals must be reversed, and the convictions of respondents reinstated.

Thus, within the last few weeks, the United States Supreme Court has clearly recognized and noted the legitimacy and validity of the exercise of jurisdiction by an Indian tribe over non-members on fee-patent, non-trust lands, within the exterior boundaries of the tribe's reservation. Considering the interest of the Suquamish Tribe in submitting to its Tribal Court a non-Indian who intentionally destroyed a Tribal police car which was pursuing him for violation of Tribal ordinances on Tribal lands, the jurisdiction of the Suquamish Tribal Court over this offense is clear.

Petitioner has argued that the State of Washington has assumed jurisdiction over non-trust lands within the exterior boundaries of Indian reservations, including the Port Madison Indian Reservation.

An analysis of the effect of Public Law 83–280 also shows that any jurisdiction assumed by the State of Washington must be concurrent with tribal jurisdiction. As held in *Oliphant*, jurisdiction as to offenses committed by or against Indians in Indian country was exclusively federal or tribal unless specifically and expressly limited by Congress. In Public Law 83–280, Congress was attempting to enable states to take over the burden of federal jurisdiction from the United States. Since the only jurisdiction the United States had was concurrent jurisdiction with the Tribe, the United States could not have given to the states greater jurisdiction than it had at that time, without specifically ending tribal jurisdiction also. There is nothing in the legislative history of Public Law 83–280 to suggest that the United States was attempting to give to the

states anything more than its half of the concurrent federal-tribal jurisdiction. The object was merely to relieve the federal courts and federal prosecutors of the burdens of law enforcement in Indian country. Certainly, anything so major as the divest of Indian tribes of concurrent jurisdiction over crimes committed on the reservation would have been explicitly dealt with in the legislation and widely discussed in the legislative history. This is particularly true in view of the well-established doctrines of law that all agreements, treaties, statutes, and laws are to be liberally construed to protect the rights of Indians with all ambiguities resolved in the Indians' favor. *Winters v. United States*, 207 U.S. 564 (1908); *Alaska Pacific Fisheries v. Untied States*, 248 U.S. 278 (1918).

2.7 Vacuum in Law Enforcement on Port Madison Reservation.

As a practical matter, jurisdiction of a tribal court over offenses committed by all persons within the exterior boundaries of the reservation is necessary for carrying out an effective law enforcement program on the reservation. The instant case clearly proves this point. The offenses allegedly committed by Petitioner occurred both on and off trust land within the Reservation. It is impossible without an official map to determine where the trust land and where the fee land begins. A request had been made of the local and county police to provide law enforcement assistance during the incident and no action was had on that request. Even when an officer of the Sheriff's Department and the State Patrol arrived on the scene, no law enforcement occurred, and, had the Tribe not asserted its jurisdiction, Petitioner would have gone unpunished.

Members of the Sheriff's Department pass quickly through the Port Madison Reservation two times during the day, once in the morning, and once at night. The Sheriff's Office is approximately forty miles away from the Reservation and thus, for all intents and purposes, without Tribal law enforcement, there is no continuing law enforcement within the boundaries of the Reservation.

Without the exercise of jurisdiction by the Tribe and its courts, there could have been no law enforcement whatsoever on the Reservation during this incident which clearly created a potentially dangerous situation with regard to law enforcement. Public safety is an underpinning

of a political entity. If tribal members cannot protect themselves from offenders, there will be powerful motivation for such tribal members to leave the reservation, thereby counteracting the express Congressional policy of improving the quality of reservation life.

Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated. Federal prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel to witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence.

Prosecutors in counties adjoining Indian reservations are reluctant to prosecute non-Indians for minor offenses where limitations on state process within Indian country may make witnesses difficult to obtain, where the jurisdiction division between federal, state and tribal governments over the offense is not clear and where the peace and dignity of the government affected is not his own but that of the Indian tribe.

Traffic offenses, trespasses, violations of tribal hunting and fishing regulations, disorderly conduct and even petty larcenies and simple assaults committed by non-Indians go unpunished. The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows. With the increased travel and involvement of non-Indians within Indian reservations, any impediment to complete tribal jurisdiction within its own territory is not tolerable.

CONCLUSION

Congress has not estinguished the governmental powers of the Suquamish Tribe to enact the local criminal laws under which Petitioner was charged. Moreover, neither the tribal law nor the manner of its enforcement by the Suquamish Tribe exceeds or conflicts with any limitation imposed upon the Tribe's governmental powers by the Indian Civil Rights Act of 1968. Therefore, the Suquamish

Tribe lawfully vested its tribal court with jurisdiction to enforce the Tribe's local criminal laws against a person committing an offense against the Tribe within the Tribe's territorial jurisdiction.

The factual analysis of this case, the legal analysis of the powers of the Suquamish Tribe, and a review of the policies of the federal government toward Indian tribes all point to the need for this Court to affirm the inherent right of the Suquamish Indian Tribe to maintain an orderly community by regulating the conduct of those who choose to enter it.

For these reasons, the Petition for a Writ of Habeas Corpus should be denied.

DATED this 31st day of January, 1975.

Respectfully submitted,
ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

/s/ _____
Barry B. Ernstaff, Council for
Suquamish Respondents.

**DISTRICT COURT—EXHIBIT A
TO RETURN OF SUQUAMISH
RESPONDENTS ON PETITION FOR WRIT OF
HABEAS CORPUS;
BUREAU OF INDIAN AFFAIRS INCIDENT
COMPLAINT REPORTS**

Filed June, 31, 1975

(Caption Omitted in Printing)

BUREAU OF INDIAN AFFAIRS

INCIDENT COMPLAINT REPORT

AGENCY W.W.A. RESERVATION Port Madison

Type of Incident or
Nature of Offense: Pursuit and Accident

Date and Time of Incident: October 11, 1974—11:45 P.M. to 1:35 A.M.

Location: Between Geneva and Fern Street

Reported by: Carl B. Bigman

Address: Box 353 Suquamish, Washington 98392

Received by _____ on _____
(Signature) (Date and Time)

Filed with Superior _____
(Show Date and Time)

Reviewed by _____ Date _____

Case Number _____ Reported to: _____
Date: _____

DETAILS OF INCIDENT AND ACTION TAKEN BY OFFICER:

October 11, 1974 at approximately 11:45 P.M. Officer Wayne P. DeCoteau picked me up at the Suquamish Tribal Law and Order Office and informed me that he had received a call from Officer Allen C. Jones on the radio that

Officer Jones was in need of assistance in pursuit of a 1973, Black, Ford Pick-up. (Lisence No. PC-5556) He said Officer Jones stated he had signaled the vehicle to stop by turning on his blue lights and siren; which the driver did not acknowledge. He stated the direction of the vehicle was heading North on South Street. As we proceeded north on South Street, we spotted vehicle speeding toward Augustine Street immensely exceeding the speed limit of 25 mph. As we approached the speeding vehicle, we signaled him to pull over by flashing our blue lights. Vehicle then sped up and swerved around the corner at the Teepee Tavern. At that point, we observed there were three (3) subjects in the vehicle (a driver and two (2) passengers), and were of the suspicion of a possible auto theft due to the unwillingness of the subjects to heed our warning signals.

We pursued vehicle to Geneva Street and he turned left going east on Second Street. Vehicle turned right on Center Street heading north. We continued to pursue vehicle on all streets of Suquamish for a period of one and one-half hours. We finally put a road-block between Cedar and Pine on Division Street at approximately 1:30 a.m. As the vehicle approached our road-block, he backed up on Pine Street and headed west on Division Street. We dispursed our road-block and resumed the pursuit.

At approximately 1:35 a.m. we came upon the vehicle between Geneva Street and Fern Street. Vehicle slowed down to almost a stop. I ordered Officer DeCoteau to overtake and block-off vehicle. We blocked the road about 20 feet in front of vehicle.

As I proceeded to open the door of the Police car, the vehicle sped up and rammed into the right door, where I was sitting. During the force of the impact I hit my head on the car door window and window shattered. Officer DeCoteau jumped out of the Police car and began chasing vehicle on foot. The driver of the vehicle backed up and attempted to try to get away. Still inside the Police car, I called out and ordered Officer DeCoteau to fire a warning shot to stop vehicle. Simultaneously as Officer DeCoteau fired the warning short, Officer Jones pulled behind the vehicle, blocking the road, and putting the vehicle to a halt.

I jumped out of the Police car and approached the vehicle. I pulled the driver out of the pick-up and ordered

Officer DeCoteau to replace his service revolver in his holster.

Subjects identified themselves as: 1) Driver, Dan Belgarde of Miller's Bay, whom the vehicle was registered under, 2) Brad Bray and 3) Mark Oliphant of Suquamish.

Officer DeCoteau gave them their rights and placed Dan Belgarde under arrest charging him with; 1) Wrecklessly Endangering Another Person, and 2) Injury to Public Property.

I called the County Sheriff's Office at approximately 1:50 a.m. and informed them of the incident and requested an investigation. At 2:20 a.m. Officer Phil Colcard arrived and called the State Patrol. Trooper Broome arrived and conducted an investigation and made out an accident report.

Officer DeCoteau and Officer Jones took custody of Dan Belgarde and transported him to Port Angeles City Jail, which is contracted as the holding facility for the Suquamish Indian Tribe.

I was taken to Harrison Memorial Hospital in Bremerton, Washington, by Galvas Cozar, Jr., Part-time Suquamish Tribal Deputy, where I was treated by Dr. Bethel and Dr. V.E. Bryan, Jr., Nevro Surgeon and Neurology, who treated me for severe whiplash and possible head injury.

BUREAU OF INDIAN AFFAIRS

INCIDENT COMPLAINT REPORT

AGENCY WWA Reservation Port Madison

Type of Incident or
Nature of Offense: Pursuit

Date and Time of Indicent: October 11, 1974–11:40 p.m.

Location: South Street, Suquamish, Washington

Reported by: _____
Address: _____

Received by: Officer Alan C. Jones
on 10/11/74 — 11:45 p.m.

Filed with Superior _____
(show date and time)

Reviewed by _____ Date _____
Reviewed by _____ Date _____
Reviewed by _____ Date _____

Case Number Reported to:
Date: _____

DETAILS OF INCIDENT AND ACTION TAKEN BY OFFICER:

About 11:40 p.m. I observed a 1973, black, ford, pick-up wrecklessly driving on South Street and immensely exceeding the speed limit (25 mph); approached the vehicle from behind and signaled him to pull over by turning on the flashing blue lights. At that point the vehicle sped up and threw gravel on the patrol car. At 11:45 p.m. I called for assistance and explained reasoning for pursuit, make, model, Lisence No. (PC5556), and direction (heading north on South Street in Suquamish). Officer Wayne DeCoteau and Captain Carl Big Man took over pursuit.

Original: Office records
Copy: Agency Special Officer
Copy (Federals only): Area Special Officer

DISTRICT COURT—REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Filed Aug. 1, 1975

(Caption Omitted in Printing)

INTRODUCTION

This Petition for a Writ of Habeas Corpus challenges the jurisdiction of the Suquamish Tribal Court to prosecute petitioner for two alleged offenses on the Port Madison Indian Reservation. The Court ordered respondents to show cause, before me, why the Petition should not be granted. Also pending is a motion to dismiss filed by respondent Secretary of the Interior. All parties have appeared by counsel, and the case has been fully briefed and argued.

FACTUAL BACKGROUND

Petitioner, a non-Indian * twenty-one years of age, was driving his pick-up truck, with two passengers, in Suquamish, Washington, in the early morning hours of Saturday, October 12, 1974. Suquamish is located wholly within the boundaries of the Port Madison Indian Reservation. According to the reports of tribal police officers, petitioner was driving recklessly and at high speed on the streets of Suquamish for several hours, pursued by tribal police vehicles. Eventually, two of those vehicles blocked petitioner's path, and he collided with the side of one of the police vehicles. Precisely what ensued thereafter is in dispute; but it is agreed that a tribal police officer fired one shot, without injury or damage; and thereafter petitioner submitted to arrest and his two passengers were released.

The tribal police officers then called the Kitsap County Sheriff's Office, and an officer of the Sheriff's Office and a State Patrolman arrived at the scene and conducted an in-

* Respondents claim petitioner has some Indian blood, but there is no claim he is a member of the Suquamish or any other tribe. This factual dispute appears to have no bearing upon the issues presented by the petition, however.

vestigation. Both declined to take any action against petitioner.

Petitioner was then transported to the Port angeles City Jail, which contracts as the holding facility for the Suquamish Indian Tribal Court. He posted bail and was released by Cecelia M. Hawk, a Judge of the Suquamish Tribal Court, at 1:30 p.m. on the same day. He appeared for arraignment with his attorney before Grace Duggan, also a Judge of the Suquamish Tribal Court, on October 18, 1974. His attorney indicated this habeas corpus action would be commenced, and further prosecution was therefore held in abeyance.

Petitioner is charged with reckless driving and destruction of tribal property under the Suquamish Tribal Law and Order Code. The reckless driving allegedly occurred on South Street in Suquamish, which is a dirt road maintained by Kitsap County. Petitioner denies he was at any time driving on South Street. The road block, collision and arrest of the defendant all occurred on Division Street in Suquamish, which is a state highway but within the reservation. The charge of destruction of tribal property relates to the allegation that petitioner intentionally rammed the tribal police car.

SUMMARY OF PETITION

This Court has jurisdiction over the petition under 25 U.S.C. §1303 and perhaps also under 28 U.S.C. §2241(c)(3). Petitioner has named, as parties respondent, Rogers C.B. Morton, Secretary of the Interior of the United States; the Suquamish Indian Tribe; Cecelia M. Hawk, Judge, Suquamish Tribal Court; and Grace Duggan, Judge, Suquamish Tribal Court.

The sixteen page petition presents a welter of allegations and contentions. Those which relate peculiariy to Secretary Morton are discussed in the following section of this Report and Recommendation. Petitioner's contentions as to the other respondents are essentially as follows.

Challenges to Jurisdiction. (1) Only the State of Washington, and not the Tribal Court, has jurisdiction over offenses by non-Indians on the Port Madison Indian Reservation.

(2) The Suquamish Tribe, and therefore its police officers, have no jurisdiction over violations committed on a

state highway within the reservation, regardless of what their authority might be as to the other portions of the reservation.

Procedural Due Process Contentions. (3) Petitioner did not and could not participate in promulgation of the Suquamish Tribal Law and Order Code, and therefore cannot be bound thereby. (4) The Law and Order Code is not published, and petitioner had no notice of its provisions. (5) Tribal police, tribal courts and the laws involved in this case are not authorized by the Suquamish Tribal constitution. (6) Petitioner was not timely advised of the charges against him and of his constitutional rights. (7) The courtroom and facilities of the Susquamish Tribal Court are not adequate for fair, open and public trial. (8) Grace Duggan, Suquamish Tribal Judge, has little knowledge of the law. (9) The Tribal Court illegally restricts the right of petitioner's attorney to practice before the tribal court. (10) Petitioner will not receive a fair trial because all the judges and potential jurors are Indians. (11) The Laws and Orders of the Suquamish Indian Tribe applied in this case violate the Indian Civil Rights Act, 25 U.S.C. §1302.

Miscellaneous Contentions. (12) The Indian Tribal Police prevented the State police and the County Sheriff from enforcing the law. (13) The tribe assesses different penalties than does the State of Washington.

DISMISSAL OF SECRETARY OF INTERIOR

The petition asserts that the Secretary of the Interior, acting through officers of the Bureau of Indian Affairs, has made contracts, and has supplied funds, property, facilities and training in support of the tribal law enforcement program. One of those contracts was with the City of Port Angeles for holding prisoners in custody for the Suquamish Tribe. Petitioner asserts he was held in the City of Port Angeles Jail for a number of hours on October 12, 1974 pursuant to the terms of that contract.

The Secretary of the Interior has moved for dismissal as a party respondent on grounds that he does not have custody of petitioner, and has no power to order petitioner's release should this court require it. Petitioner responds that the Secretary must be included as a party respondent to accord complete relief to the petitioner.

It is axiomatic that a petitioner for a writ of habeas corpus can only properly be brought against a person having custody of petitioner. There is no sense in which the Secretary of the Interior can so be regarded at this time. The motion to dismiss the Secretary of the Interior should be granted.

I note, in passing, that in *Mark David Oliphant v. Edward Schlie, Chief of Police of the City of Bremerton, et al.*, Case No. 511-73C2 in this court (now pending on appeal), respondent Schlie was dismissed at an early stage of the proceeding because he no longer had custody or control over the petitioner. While the Secretary of the Interior stands in a somewhat different position, for the reasons stated by petitioner, nevertheless the controlling fact is the same: the Secretary of the Interior has neither custody or control over petitioner.

ISSUES RESOLVED IN OLIPHANT CASE

Many of the issues raised in this case were presented in the *Oliphant* Case, and were resolved by this court in its Memorandum Opinion.*

Both cases involve arrests of a non-Indian by the Suquamish Tribal Police for offenses allegedly committed within the exterior boundaries of the Port Madison Indian Reservation. All of the respondents in this case (except for the Secretary of the Interior) were respondents in the *Oliphant* case. The same counsel represents both petitioners. Ironically, Mr. Oliphant was a passenger in the truck at the time of Mr. Belgarde's arrest.

Although the *Oliphant* decision is now on appeal, and although petitioner in this case was not a party in *Oliphant*, nevertheless the rulings in that case on issues of law establish binding precedent for this district.

The relevant holdings in *Oliphant* may be summarized as follows. The Suquamish Indian Tribe is duly organized as a local governmental body on the Port Madison Indian Reservation. As such, it has *retained certain inherent sovereign powers*, and has established a valid justice and law enforcement program by enacting an approved law and order code and establishing a police system and tribal

*A copy of the *Oliphant* Memorandum Opinion is contained in the court file in this case as Exhibit C to document 11, the "Return of Suquamish Respondents on Petition for Writ of Habeas Corpus."

court. ". . . the Suquamish tribe may exercise its powers of local government over a non-Indian who enters within the tribe's territorial jurisdiction and commits an offense defined as a crime by its local tribal laws unless Congress has expressly extinguished the tribe's original inherent powers of self-government with respect to such a crime. Although the act of petitioner may constitute a federal crime under the general criminal laws of the United States, the same acts may also constitute a tribal crime under the local laws of the Suquamish Indian Tribe for which the offender may be lawfully prosecuted and punished by the Suquamish tribal court. In the present case, the United States has chosen not to exert its jurisdiction and the tribe has asserted its share of the concurrent jurisdiction of the tribe and the United States." (Memorandum Opinion in *Oliphant*, Pages 5-6).

The court found that the only limits that Congress had placed upon the jurisdiction of the tribal court were: (1) A tribe may not enact local laws which conflict directly with federal laws applicable in Indian country; (2) The criminal jurisdiction of tribal courts is limitd to offenses with a maximum penalty of not more than 6 months imprisonment or a fine of five hundred dollars or both for any one offense; (3) Persons subject to tribal jurisdiction, whether Indians or non-Indians, are entitled to certain protections under the Indian Civil Rights Act of 1968, 25 U.S.C. §1302.

With the foregoing as a foundation, we can now examine the respects in which this case presents issues not resolved in *Oliphant*.

JURISDICTION OF TRIBAL COURT

1. *State Highway v. Trust Land*. The essential factual distinction between this case and *Oliphant* is that, in *Oliphant*, the alleged offenses occurred on land held in trust by the United States Government for the benefit of Indians. In this case, the alleged offenses occured on a county road and on a state highway within the boundaries of the reservation, and the arrest was made on the state highway. This court in *Oliphant* expressly reserved the question of whether such facts would make a jurisdictional difference.

Since the decision in *Oliphant*, the U.S. Court of Appeals for the Ninth Circuit has decided a case which involved the issue of the power of a tribal officer to make an arrest on a state highway running through an Indian reservation. In *Ortiz-Barraza v. United States*, 512 F. 2d 1176 (9th Cir., 1975), a tribal police officer stopped defendant, a non-Indian, on a public highway on the Papago Indian Reservation in Arizona. During a search which the court held to be reasonable, the tribal officer located marijuana. Defendant was convicted in the U.S. District Court for importation and possession of marijuana with intent to distribute. In response to one of the contentions made by defendant in that case, the court held:

> ". . . the fact that the events of interest here may have occurred within the right-of-way for a state highway vails the defendant nothing. Rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police. *See, Gourneau v. Smith*, 207 N. W. 2d. 256 (N. Dak., 1973); 18 U.S.C. §1151 (1970)" (512 F. 2d at 1180).

It is true that *Ortiz-Barraza* does not specifically hold a tribal court may prosecute a non-Indian for offenses against the tribal code committed on a state highway running through the reservation. That case involved a prosecution under federal law, not tribal law. But the significant point is that the court held the territorial jurisdiction of the tribe and of its police, was the same on a state highway as on the balance of the reservation.

On the strength of the *Ortiz-Barraza* decision, and the authorities there cited, and in the absence of any contrary authority, I recommend this court find the Suquamish Tribal Court has jurisdiction over offenses against the tribal code committed on state highways running through the reservation.

2. *Federal or State Jurisdiction*. The parties have also thoroughly briefed and argued the issue of whether, in light of the very complex sequence of federal and state legislation, the United States or the State of Washington now has jurisdiction over criminal offenses committed on the Port Madison Indian Reservation. This Court in *Oliphant* clearly was of the view that the United States, not the State of Washington, had concurrent jurisdiction with the tribe. But it is not clear from the records currently in this court whether the same contentions were presented in that case. They are not mentioned in the Memorandum Opinion,

although they do appear in the *Oliphant* appeal briefs.

In any event, briefly summarized, the issues are as follows. In the Trade and Intercourse Act, 18 U.S.C. §1152, Congress in 1875 provided (with exceptions not directly relevant): "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian county."

In a series of steps beginning with a Congressional enactment on August, 1953, and culminating in a proclamation by Governor Rosellini in 1958, federal jurisdiction over offenses committed on the Port Madison Indian Reservation was transferred to the State of Washington.

Respondents assert that, thereafter, pursuant to federal and state legislation and a proclamation by Governor Evans in 1971, state jurisdiction was retroceded from the State of Washington back to the federal government. The parties have briefed and argued in detail the complex legal issues as to both the scope of the retrocession and its legal validity.

But in my view, those issues are wide of the mark in this case, because I conclude the Suquamish Tribe at all times retained *concurrent* jurisdiction over offenses committed on the reservation. In view of that conclusion, it matters little whether the other half of the concurrent jurisdiction is in the United States or in the State of Washington; and the complex issues surrounding that question are inappropriate for resolution in this case.

This court held in *Oliphant*, of course, that the tribe had concurrent jurisdiction over offenses committed on trust lands within the reservation. As noted, this holding was based upon authorities holding that the tribe had inherent sovereign power unless expressly deprived of it by federal statute or treaty.

Petitioner contends that the Trade and Intercourse Act (18 U.S.C. §1152) conferred *exclusive* jurisdiction upon the federal courts, and deprived the tribal courts of any jurisdiction. But petitioner cites no authority to support that proposition. In addition, it is directly contrary to the development, and recognized authority, of tribal courts. Indeed, it is contradicted at least in part by the language of the section itself, which clearly contemplates that an Indian

committing an offense in the Indian country might be punished by the local law of the tribe.

Petitioner next asserts that Public Law 83-280*, in authorizing under some circumstances the transfer of federal jurisdiction to the states, contemplated that such states would have exclusive jurisdiction. But there is nothing in the language of Public Law 83-280 to suggest that Congress was transferring *exclusive* jurisdiction; nor has petitioner cited authority for that proposition.

For the foregoing reasons, I conclude that Congress has never expressly deprived the Suquamish Indian Tribe of its concurrent jurisdiction over offenses committed on the Port Madison Indian Reservation; and this court should reaffirm its holding in *Oliphant* in that respect.

PROCEDURAL DUE PROCESS CONTENTIONS

Petitioner asserts he has been denied procedural due process in a number of respects. Some of these, if established by sufficient evidence, would constitute violations of the Indian Civil Rights Act (25 U.S.C. §1302) and might entitle petitioner to habeas corpus relief under 25 U.S.C. §1303. Specifically, from the contentions listed at the beginning of this Report and Recommendation, the five which fall into this category are:

(4) The Law and Order Code is not published, and petitioner had no notice of its provisions.

(7) The courtroom and facilities of the Suquamish Tribal Court are not adequate for fair, open and public trial.

(8) Grace Duggan, Suquamish Tribal Judge, has little knowledge of the law.

(9) The Tribal Court illegally restricts the right of petitioner's attorney to practice before the tribal court.

(10) Petitioner will not receive a fair trial because all the judges and potential jurors are Indians.

All these relate to the guaranty in §1302(6) of a public trial and of the right to the assistance of counsel, and the guaranty in Section 1302(8) of the right to due process of law.

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*Public Law 83-280 is not, to my knowledge, currently contained in the U. S. Code; but its language appears on page 2 of Attorney General Opinion 1972 No. 9, which is Exhibit H, to document 13.

Procedural Challenges Should Only Be Considered After Trial. It is my recommendation, however, that it is premature for this court to proceed with an evidentiary hearing on these claims at this time. Several of them cannot, as a practical matter, be resolved until after petitioner has been tried. How can this court pass upon the adequacy of the courtroom until the trial has been conducted? How can this court determine at this stage whether counsel will be unfairly restricted from participating in the trial? And it hardly seems appropriate to try the trial judge and jury before the trial of the defendant. Finally, of course, there is the possibility that petitioner might be acquitted.

Petitioner Should Be Required To Exhaust Tribal Remedies. Petitioner should not only be required to complete his trial before the tribal court. In addition, before pursuing his petition for habeas corpus relief in this court, he should be required either to exhaust his remedies before the tribal courts, or to demonstrate to the satisfaction of this court that there are no meaningful tribal court remedies.

The requirements for exhaustion of remedies in a habeas corpus challenge to the jurisdiction of a tribal court does not have the clear statutory foundation that this requirement enjoys in cases involving challenges to actions by state courts. But in *U. S. ex rel. Cobell v. Cobell, et al.*, 503 F. 2d 790 (9th Cir., 1974), cert. denied., ——— U.S. ———. (1975, the Court of Appeals for this circuit gave qualified recognition to, ". . . the exhaustion principle in the tribal context . . ." (503 F. 2d at 793).

Cobell involved a child and custody struggle between an Indian couple, and a jurisdictional struggle between the state courts in Montana and the tribal courts. The courts entered conflicting custody orders, and the father sought habeas corpus relief in a third court system, the United States District Court. The Ninth Circuit agreed that generally an applicant for habeas corpus relief under 25 U.S.C. §1303 must first exhaust his tribal remedies, and approved the reasoning in *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz., 1968), and in *O'Neal v. Cheyenne River Sioux Tribe*, 482 F. 2d 1140 (8th Cir., 1973). The court also cited *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah, 1973).

In *Cobell*, *Dodge* and *McCurdy*, however, the courts approved the exhaustion requirement as a general matter, but found that under the particular facts of each case exhaustion of remedies should not be required. In *Cobell* and *McCurdy*, the courts found that there were no meaningful remedies in the tribal courts. In *Dodge*, the court noted that exhaustion of remedies would result in an undesirable multiplicity of actions.

In *O'Neal*, however, while agreeing that the exhaustion requirement was not inflexible, the court found that there was no good reason not to require exhaustion of remedies, and dismissed the action.*

In the case at bar, there are many good reasons for requiring exhaustion of remedies, and no reasons against it have been presented. The basic rationale for requiring exhaustion of tribal remedies was set forth in *Dodge v. Nakai* and quoted with approval in *Cobell*:

> "First, this interpretation [reading an exhaustion requirement into the act] would reconcile the statute with 'a strong Congressional policy to vest Navajo Tribal Government with responsibility for their own affairs.' . . . Second, this interpretation would place primary responsibility for the vindication of rights violated by Indian governmental agencies upon the tribal courts. Such responsibility may well enhance the development of an independent Indian judiciary, thus reconciling the statute with recognized federal policy. . . . Third, this interpretation would insure that this Court would intervene only in those instances in which local conflicts cannot be resolved locally. . . ." (503 F. 2d at 793).

Petitioner, of course, should be afforded the opportunity to demonstrate to this court, once the trial has been completed, that there are no meaningful tribal remedies, or that there is some other compelling reason why these issues should be adjudicated immediately in this court.

But in the absence of such a showing, it is my recommendation that this court decline to proceed on the above five contentions until the trial has been completed and petitioner has exhausted his tribal remedies with respect thereto.

OTHER CONTENTIONS WITHOUT MERIT

The other six contentions advanced by petitioner are without merit. Specifically, these include the ones num-

*Although *O'Neal* was not a habeas corpus case, it was based upon alleged violations of the Indian Bill of Rights.

bered 3, 5, 6, 11, 12, and 13 in the list above.

Petitioner contends he did not and could not participate in the promulgation of the Suquamish Tribal Law and Order Code, and therefore cannot be bound thereby. This contention was implicitly, if not expressly, rejected in *Oliphant*. In addition, the Supreme Court considered and rejected a similar contention in *U. S. v. Mazurie*, 419 U.S. 544, 557-8 (1975).

The contention that the Suquamish Tribal Constitution does not support the jurisdiction of the Suquamish tribal courts and its police officers is foreclosed by the holding to the contrary in *Oliphant*.

Petitioner asserts he was not timely advised of the charges against him and of his constitutional rights. But there is apparently no question, at least as of now, as to what the two specific charges against him are; and he has made no allegations of how he was prejudiced by any delay in advising him of those charges. Similarly, as to advice of his constitutional rights, there is no allegation of prejudice, such as the taking of incriminating statements during the time he was in custody. The allegations alone are insufficient to support any claim for habeas corpus relief.

Petitioner has included an "umbrella" claim that the laws and orders of the Suquamish Indian Tribe applied in this case violate the Indian Civil Rights Act. But this does not seem to add any new allegations to the more specific allegations already discussed.

Petitioner asserts that the Indian Tribal Police prevented the State Police and the Kitsap County Sheriff from enforcing the law. No facts of any kind are alleged in support of this contention. Indeed, respondents allege, and petitioner has not denied, that the state and county officers were given "first crack" at this case, but declined to take any action. Petitioner's contention in this respect is frivolous.

Finally, petitioner asserts that the tribe assesses different penalties for conduct on state highways within the reservation than those which apply to "a white citizen of the State of Washington when on a public highway. . . ." (Petition, page 12). By this allegation, petitioner attempts to assert a claim under the Fourteenth Amendment and 42 U.S.C. §1981. His contention in this regard is without merit, however. If the conclusion is correct that the tribe has independent jurisdiction over non-Indians on public highways within the reservation, there is no denial of equal

protection. Petitioner, of course, is not in any respect being denied the rights of a "white citizen".

SUMMARY

Based upon the foregoing, I recommend this court take the following action:

(1) find that the Suquamish Tribal Court has jurisdiction over petitioner and the two offenses charged against him;
(2) dismiss the petition for a writ of habeas corpus; and
(3) provide in the order of dismissal that it shall be without prejudice to the right of petitioner to re-assert the contentions numbered 4, 7, 8, 9 and 10 above, once the trial is completed, and conditioned upon exhaustion of all tribal remedies or upon a showing that there are no meaningful tribal remedies.

DATED this 1st day of August, 1975.

John L. Weinberg
U.S. Magistrate

DISTRICT COURT—ORDER DENYING WRIT OF HABEAS CORPUS

Filed Aug. 18, 1975

(Caption Omitted in Printing)

THIS MATTER having come on for hearing before the undersigned Judge upon the application of Petitioner for a Writ of Habeas Corpus, the Court having referred this matter for a report and recommendation to the United States Magistrate pursuant to 28 U.S.C., Sec. 636 and Local Rule M.R. 28, Petitioner appearing by and through his attorney, Philip T. Malone, Respondents Suquamish Indian Tribe, Cecilia M. Hawk, and Grace Duggan having appeared by and through their attorneys, Ziontz, Pirtle, Morisset, Ernstoff & Chestnut, Respondent Rogers C.B. Morton having appeared by and through his attorneys, the Department of Justice and Stan Pitkin, United States Attorney, the Magistrate having issued his report and recommendation, the Court having heard further argument from counsel at the hearing on August 15, 1975, and being fully advised, it is hereby

ORDERED that;

1. The report and recommendation of the Magistrate is adopted in full as issued on August 1, 1975.

2. The Suquamish Tribal Court has jurisdiction over Petitioner and the two offenses charged against him.

3. The Secretary of Interior is dismissed from this action as he was not a person having custodyof Petitioner.

4. The Petition for a Writ of Habeas Corpus is denied, and this action is dismissed without prejudice to the right of Petitioner to reassert the contentions numbered 4, 7, 8, 9, and 10 listed in the Magistrate's report and recommendation on page 11, once the trial is completed, and conditioned upon exhaustion of all tribal remedies or upon a showing that there are no meaningful tribal remedies.

DONE IN OPEN COURT this 18th day of August, 1975.

U.S. District Judge

Presented by:

ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT

Barry D. Ernstoff, of Attorneys
for Suquamish Respondents

Approved and Notice of Presentation Waived by:

Stan Pitkin, U.S. Attorney

---

of Attorneys for Respondent Morton

Approved as to form and
Notice of Presentation waived:

Philip T. Malone, of Attorneys
for Petitioner

DISTRICT COURT—JUDGMENT DENYING WRIT OF HABEAS CORPUS

Filed Aug. 22, 1975

(Caption Omitted in Printing)

This action came on for trial (hearing) before the Court, Honorable Morell E. Sharp, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the petiton for a writ of habeas corpus is DENIED, and this action is DISMISSED without prejudice to the right of petitioner to reassert the contentions numbered 4, 7, 8, 9, and 10 listed in the Magistrate's Report and Recommendation on page 11, once the trial is completed, and conditioned upon exhaustion of all tribal remedies or upon a showing that there are no meaningful tribal remedies.

Dated at Seattle, Washington, this 22nd day of August, 1975.

Betty Fleming
Deputy Clerk of Court

DISTRICT COURT—NOTICE OF APPEAL

Filed Sept. 4, 1975

(Caption Omitted in Printing)

NOTICE IS HEREBY GIVEN that DANIEL B. BELGARDE, Petitioner above-named, hereby appeals to the United States Court of Appeals for the 9th Circuit from the Judgement entered in this action on the 22nd day of August, 1975 denying the issuance of a Writ of Habeas Corpus as petitioned for herein.

PHILIP P. MALONE,
Attorney for Petitioner

**NINTH CIRCUIT COURT OF APPEALS—
STIPULATION FOR ORDER HOLDING APPEAL IN ABEYANCE**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL B. BELGARDE, *Petitioner-Appellate,* *vs.* SUQUAMISH INDIAN TRIBE; CECELIA M. HAWK, Judge, Suquamish Tribal Court; and GRACE DUGGAN, Judge, Suquamish Tribal Court, Respondents-Appellees.	NO. 75-3319 STIPULATION FOR ORDER HOLDING APPEAL IN ABEYANCE

Appellant, DANIEL B. BELGARDE, by and through his attorney, Phillip P. Malone, and Appellees, SUQUAMISH INDIAN TRIBE, CECELIA M. HAWK, and GRACE DUGGAN, by and through their attorneys, Ziontz, Pirtle, Morisset, Ernstoff & Chestnut, hereby stipulate and agree as follows:

I.

In view of the fact that Rogers C. B. Morton has been dismissed as a party in this action, and that Order of Dismissal was not appealed from, the official name of this case in the Ninth Circuit Court of Appeals should be *Daniel B. Belgarde v. Suquamish Indian Tribe, et al.*

II.

This Court should enter an order holding the appeal in this action in abeyance, including the briefing schedule, pending the entry of an opinion in the case of *Oliphant v. Schlie*, No. 74-2154, now being considered by this Court. Oral argument in *Oliphant* took place on October 17, 1975. The Report and Recommendation of the Magistrate adopted by the District Court below (R.—119; R.—135), and the District Court's decision in this action relied on the earlier decision in *Oliphant*. The two cases are closely related in that *Oliphant* dealt with jurisdiction of the Suquamish Indian Tribe over an offense committed by a non-Indian on trust land within the boundaries of the Port Madison Indian Reservation and this action deals with the same occurrence but on fee patent land within the exterior boundaries of the same reservation. Thus a decision by this Court in *Oliphant* would have a direct effect on the legal arguments and positions being set forth in the present case. Counsel for both sides are the same in both *Oliphant* and the present case. A decision by this Court in *Oliphant* either affirming or reversing the District Court, would probably affect the desire of one party or the other to continue with the appeal in this case. The ends of justice would therefore best be met by allowing the briefing schedule in this case to begin running from the date of the entry of an opinion in *Oliphant v. Schlie*.

DATED this 14th day of November, 1975.

Philip P. Malone of
Attorneys for Appellant

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

Barry D. Ernstoff of
Attorneys for Appellees

NINTH CIRCUIT COURT OF APPEALS—ORDER HOLDING APPEAL IN ABEYANCE PENDING COURT'S DECISION IN OLIPHANT vs. SCHLIE, COURT OF APPEALS CAUSE NO. 74-2174

Filed Jan. 5, 1976

(Caption Omitted in Printing)

Before: ELY and GOODWIN, Circuit Judges

Upon due consideration of appellant's motion for the appeal to be held in abeyance, all further proceedings in this appeal shall be held in abeyance pending this Court's decision in case number 74-2154, *Oliphant v. Schlie*.

_____

_____

Mo Cal 1/5/76 U.S. Circuit Judges

In the Supreme Court of the United States

No. 76-5729

MARK DAVID OLIPHANT,
Petitioner,

v.

THE SUQUAMISH INDIAN TRIBE, et al.; and
DANIEL B. BELGARDE,
Petitioner.

v.

THE SUQUAMISH INDIAN TRIBE, et al.

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 13, 1977

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

Oliphant v. Suquamish Indian Tribe, et al. The opinion of the Ninth Circuit Court of Appeals is not yet published. The opinion of the District Court is unpublished. Both opinions are included in Appendix "A" of the Petition for Writ of Certiorari.

Belgarde v. Suquamish Indian Tribe, et al. This case is now pending before the Ninth Circuit Court of Appeals, Cause No. 75-3319. The Order Denying Writ of Habeas Corpus of the District Court is unreported and is included in Appendix "A" of the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI IN BELGARDE V. THE SUQUAMISH INDIAN TRIBE

Petitioner has requested a Writ of Certiorari to the Ninth Circuit Court of Appeals in Belgarde v. The Suquamish Indian Tribe at the preliminary stages of that appeal. Judgment has not been rendered in that case by the Court of Appeals and, in fact, the parties have not yet submitted briefs to that Court. The first paragraph of the opinion of the Ninth Circuit Court of Appeals in Oliphant v. The Suquamish Indian Tribe states that it involves jurisdiction over non-Indians "while on tribal land within the boundaries of the reservation." The issue of jurisdiction over a non-Indian who commits a crime within the boundaries of a reservation but not on "tribal land" was not presented in Oliphant. That, however, is precisely the issue raised in Belgarde and the Ninth Circuit should not be deprived of the opportunity to render judgment on that separate issue.

Petitioner Belgarde has clearly not met the strict standard of Rule 20 of Supreme Court Rules, having failed to show "that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court."

The remainder of this Brief in Opposition, consequently, will deal only with the issues raised in Oliphant.

QUESTIONS PRESENTED

Petitioner, a non-Indian residing on the Port Madison Indian Reservation, was arrested by Suquamish Indian Tribal Police during the annual Tribal Celebration and was charged with assaulting a police officer and resisting arrest. The offense took place on the Suquamish Tribal Encampment Grounds, which is held in trust by the United States for the benefit of the

Suquamish Indian Tribe.

1. Does the Suquamish Tribe have the power to vest its Tribal Court with jurisdiction over Petitioner's offense?

2. Has Congress extinguished the jurisdiction of the Suquamish Tribe over Petitioner's offense?

3. Has the State of Washington assumed exclusive jurisdiction over Petitioner's offense?

4. Is the exercise of jurisdiction by the Suquamish Tribe over Petitioner's offense consonant with express congressional and executive policies?

TREATIES, STATUTES, AND ORDINANCES INVOLVED

The following treaties, statutes and ordinances are set out in full in Appendix "B" attached to the Petition for Writ of Certiorari.

Treaty of Point Elliott, 12 Stat. 927 (1859);

Indian Reorganization Act, 25 U.S.C. § 476;

General Crimes Act, 18 U.S.C. § 1152, and predecessor acts;

Public Law 83-280, 67 Stat. 588, specifically, 18 U.S.C. §1162;

Indian Civil Rights Act, 25 U.S.C. § 1302, 1323;

Revised Code of Washington, Ch. 37.12;

Constitution and By-Laws of the Suquamish Indian Tribe of the Port Madison Indian Reservation (July 2, 1965);

Suquamish Law and Order Code.

STATEMENT OF THE CASE

Petitioner, a non-Indian residing on the Port Madison Indian Reservation, was involved in an altercation on the Suquamish Tribal Encampment Grounds, which is held in trust by the United States for the benefit of the Suquamish Indian Tribe. A Suquamish Tribal policeman called to the scene was assaulted by

Petitioner, and Petitioner was arrested for assaulting a police officer and resisting arrest. These events took place in 1973 during the annual Suquamish Tribal Celebration known as Chief Seattle Days, while a number of Indians were encamped on the Tribal grounds participating in the Celebration.

Petitioner was arraigned under the Suquamish Tribal Law and Order Code in the Suquamish Tribal Court and bail was set in the amount of $100.00 for each charge. Petitioner did not post bail and was incarcerated for a period of five days in the jail of the City of Bremerton as a prisoner of the Suquamish Indian Tribe, under an agreement between the City of Bremerton and the Bureau of Indian Affairs, providing for the holding of tribal prisoners in the jail facility. Petitioner was then released on his personal recognizance by order of the Suquamish Tribal Court.

Petitioner then sought a writ of habeas corpus in the United States District Court For the Western District of Washington under 25 U.S.C. §.1303. He based his application for the writ upon a challenge to the jurisdiction of the Suquamish Indian Tribal Court; specifically, he claimed that the Tribe lacked jurisdiction over a non-Indian committing an offense against an Indian on reservation land held in trust by the United States Government for the benefit of the Tribe.

The District Court denied the writ, holding that the Suquamish Tribal Court had such jurisdiction and that the rights of the Petitioner had not been violated.[1]

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1. Petitioner raised additional claims of procedural due process violations which were rejected by the District Court. The decision of the District Court on those claims was not appealed, and they are not in issue before this Court.

The United States Court of Appeals for the Ninth Circuit affirmed. The Court reasoned that the jurisdiction of the Suquamish Indian Tribe over this matter had not been withdrawn by treaties or acts of Congress and that such power therefore remained in the Tribe at this time.

Although the District Court denied Petitioner's request for a stay of the Tribal Court proceedings, the Suquamish Tribal Court voluntarily held the tribal prosecution against the Petitioner in abeyance, pending the outcome of the federal litigation. That prosecution is still being held in abeyance, and the Petitioner remains free on his personal recognizance.

The Port Madison Indian Reservation was established for the Suquamish Indian Tribe in the State of Washington pursuant to the Treaty of Point Elliott, 12 Stat. 927 (1859). The Suquamish Indian Tribe is a federally-recognized Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and operating under a constitution and by-laws approved by the Undersecretary of the Interior on July 2, 1965.[2] The Tribe has established a valid justice and law enforcement program on the Reservation by enactment of an approved Law and Order Code[3] and the establishment of a police system and Tribal Court.

The Suquamish Indian Tribal Council acts as the local government on the Port Madison Indian Reservation. The Tribe qualifies as a unit of local government under the Revenue Sharing Act of 1971 (86 Stat. 919, 924) and under the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 197, 209) and receives federal funds for the improvement of law enforcement on

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2. Petition, App. "B" at 6.

3. Petition, App. "B" at 39.

the Reservation. Its Tribal judges participate in national Indian tribal judges' seminars and institutes and its Tribal policemen are trained at Indian police academies and participate in additional in-service training.

ARGUMENT

The issue in the present case is simply whether a federally-recognized local government has the right to protect the peace and safety of its citizens by prosecuting under its laws a person who voluntarily enters the territorial jurisdiction of that government and commits an offense. That the government is an Indian tribe, and the alleged perpetrator a non-Indian, cannot change the nature of the case into one compelling Supreme Court review.

It should be noted at the outset that Petitioner does not here allege that his right to due process of law was violated and does not attack the criminal procedures followed by the Tribe. Rather, Petitioner takes the novel position that since his race differs from that of the government controlling the land on which he committed his offense, he is immune from prosecution by that government.

Although it is true that the exact issue presented by this case has not been decided by this Court, the basis for the Ninth Circuit's decision is contained in decisions of this Court spanning 150 years of litigation on matters of Indian jurisdiction. A review of these decisions compels denial of the Petition for Writ of Certiorari.

I. THE SUQUAMISH TRIBE HAS INHERENT POWER TO VEST ITS TRIBAL COURT WITH JURISDICTION OVER PETITIONER'S OFFENSE.

As succinctly stated in the Ninth Circuit decision, the issue presented by this case is determined by resolution of

the following questions: What were the original sovereign powers of the Tribe and, then, how far and in what respects have these powers been limited?[4]

As this Court has stated, sovereignty is the "backdrop" against which cases involving Indian jurisdiction must be viewed. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). There can be no argument that Indian tribes possessed all of the original inherent powers of any sovereign nation. One of the attributes of that sovereignty was the power to preserve order by punishing those who violate tribal law. This Court has stated previously that not only do Indian tribes have general criminal jurisdiction, but that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive" Williams v. Lee, 358 U.S. 217, 220 (1959).

These concepts of sovereignty were first recognized in a case which became the foundation for the development of basic principles of Indian law in this country, Worcester v. Georgia, 31 U.S. 515 (1833), in which Chief Justice Marshall stated that Indian tribes continue to possess those sovereign powers that are neither inconsistent with their status nor expressly terminated by Congress.

For a number of years, many of these inherent sovereign powers of Indian tribes were not exercised as the United States Government began to take a firm grasp of the administration of Indian affairs. In 1934, the Indian Reorganization Act was passed, 25 U.S.C. §476, resulting in the revitalization of tribal self-government.

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4. Petition, App. "A" at 9.

But it was not until the passage of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, and the providing of technical and financial assistance to Indian tribal governments and law enforcement agencies that tribes such as the Suquamish Tribe began to assert many of the governmental powers which had been lying dormant during the years of federal paternalism.

After many years of ineffective federal and state law enforcement on the isolated Port Madison Indian Reservation, the Suquamish Tribe found it necessary to pass a Tribal code to regulate the conduct of persons within its territorial jurisdiction. The Tribal code defines as offenses activities which would ordinarily be deemed to be petty offenses or misdemeanors in other jurisdictions. Furthermore, in accordance with 25 U.S.C. § 1302, penalties are limited to a maximum of six months imprisonment and/or a $500 fine.

When the Tribe planned its annual Chief Seattle Days Celebration, it expected thousands of people to congregate in a small area on the Tribal Encampment Grounds for the Celebration. Requests were made of state, county, and federal law enforcement officials for law enforcement assistance. The Tribe was told that it would have to provide its own law enforcement out of Tribal funds and with Tribal personnel.

Therefore, when Petitioner committed his offense, the only law enforcement officers available to deal with the situation were Tribal deputies. Without the exercise of jurisdiction by the Tribe, there would have been no law enforcement whatsoever on the Reservation during this major gathering, clearly creating a danger to public safety.

The realities of such a situation, occurring repeatedly on Indian reservations throughout the country, justify the support of tribal jurisdiction by the District Court and the Ninth Circuit.

In cases dealing with tribal jurisdiction, this Court has consistently rejected the notion that the non-Indian status of a party somehow deprives the tribe of jurisdiction which otherwise it would clearly have. In Williams v. Lee, supra, this Court held that jurisdiction over a civil suit between a non-Indian and an Indian resided with the tribal court:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. (Citations omitted). The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.
>
> If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223.

More recently, in United States v. Mazurie, 419 U.S. 544 (1975), this Court upheld the jurisdiction of an Indian tribe over non-Indians regarding the regulation of the sale of liquor. Moreover, this Court specifically rejected the notion that the tribe's power is diminished by the non-Indian status of one of the parties. The Court cited Williams v. Lee, supra, noting that it held that "the authority of tribal courts could extend over non-Indians insofar as concerns their transactions on a reservation with Indians." 419 U.S. at 558.

The only case which has ever deviated from this principle was Ex parte Kenyon, 14 F.Cas. 353 (C.C.W.D.Ark. 1878).

However, just a few years later when given the opportunity to comment on Kenyon, this Court in Elk v. Wilkins, 112 U.S. 94 (1884), noted that the decision in Kenyon depended on the fact that the activity for which the non-Indian was being punished actually took place outside the boundaries of a reservation.

Also, Congress has repeatedly acted in a manner consistent with the existence of tribal jurisdiction over non-Indian activities. For example, consider the 1968 Indian Civil Fights Act, 25 U.S.C. §1302. Until the passage of that Act, the traditional authority of an Indian tribe was not subject to constitutional civil rights limitations. Talton v. Mayes, 163 U.S. 376 (1896). That Act, in effect, extended a modified version of the Bill of Rights to Indian tribal governments. As the legislative history of that Act clearly shows, it was intended to establish rights for all persons who would become subject to the jurisdiction of tribal government, whether Indian or non-Indian. In fact, the original bill provided for protections only for "American Indians"; however, it was later changed to provide for broader protection for "any person." See Dodge v. Nakai, 298 F.Supp. 17, 24 (D.Ariz. 1968).

The decision of the Ninth Circuit is thus supported by the decisions of this Court, as well as the actions of Congress.

II. CONGRESS HAS NOT EXTINGUISHED THE JURISDICTION OF THE SUQUAMISH TRIBE OVER PETITIONER'S OFFENSE.

Petitioner suggests that Congress, by extending federal criminal jurisdiction to Indian country, has stripped Indian tribes of the right to exercise concurrently their criminal jurisdiction over reservation trust land. However, Petitioner points to no act of Congress which has expressly withdrawn that inherent tribal jurisdiction.

Petitioner then urges this Court to infer such Congressional action. The basis for this position is that when Congress extended general federal criminal jurisdiction to Indian reservations, it somehow by implication ended the tribe's own jurisdiction in this area. However, Petitioner fails to demonstrate that the existence of general federal criminal jurisdiction is inconsonant with the concurrent jurisdiction of another governmental authority. Certainly, the Ninth Circuit's analysis of the legislative history of the General Crimes Act, 18 U.S.C. §1152, shows that Petitioner's argument is not meritorious.

Furthermore, the statutes and cases discussed above clearly indicate that both Congress and this Court have never considered tribal power to be extinguished upon the extention of federal power over Indian reservations. Rather, it has been consistently presumed that tribes retain concurrent authority in such circumstances.

In fact, Petitioner's theory leads inexorably to the conclusion that Indian tribes have been deprived of criminal jurisdiction not only over non-Indians, but also over tribal members over whom general federal criminal jurisdiction has also been extended. Clearly, Congress never so intended; and the decisions of this Court supporting tribal authority refute Petitioner's contention. Williams v. Lee, supra.

III. THE STATE OF WASHINGTON HAS NOT ASSUMED EXCLUSIVE JURISDICTION OVER PETITIONER'S OFFENSE.

Petitioner claims that even if the Tribe inherently had jurisdiction over his offense and that this jurisdiction continued concurrently after the extension of general federal

criminal jurisdiction, nevertheless, such tribal jurisdiction was terminated by the State's assumption of federal jurisdiction under Public Law 83-280, 67 Stat. 588. Petitioner points to no decision of this Court or of any of the Circuit Courts supporting his theory. Indeed, there are none.

In the first place, the State of Washington has not assumed jurisdiction over matters occuring on Tribal trust land on the Port Madison Indian Reservation.

It is true that, in 1958, the Suquamish Tribe, pursuant to RCW Ch. 37.12 (the State statute authorizing assumption of jurisdiction under the terms of Public Law 83-280) requested the State to assume jurisdiction over the Reservation. However, with the growth of the Indian self-determination movement in the 1960's, the Tribe realized its mistake and requested the Governor to proclaim retrocession of criminal and civil jurisdiction over the Reservation back to the United States. On August 26, 1971, Governor Daniel J. Evans proclaimed that retrocession, which was accepted on April 14, 1972, by the United States. This acceptance was published, in accordance with the terms of 25 U.S.C. § 1323, the retrocession statute. 37 F.R. 7353 (1972).

The Attorney General of the State of Washington later opined that Governor Evans lacked authority to retrocede such jurisdiction and that such action would have to be taken by the Legislature. However, the United States had already accepted the retrocession. The decision below upheld the retrocession citing the decisions in United States v. Brown, 334 F.Supp. 536, 540-41 (D.Neb. 1971) and Omaha Tribe of Nebraska v. Walthill, 334 F.Supp. 823 (D.Neb. 1971), aff'd 460 F.2d 1327 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973). Those cases

involved identical issues of the official acceptance of retrocession by the United States and a later determination by the State that the State procedure for such retrocession had not been properly followed by the State Government. The Court in those cases held:

> . . .[O]nce the Secretary received from the state officials what appeared to be an official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute.

334 F.Supp. at 832.

Secondly, it is irrelevant whether state jurisdiction has been assumed under Public Law 83-280. The legislative history of that Act makes it clear that the intent was merely to allow the states to assume the federal portion of the concurrent jurisdiction being shared by Indian tribes and the Federal Government. Williams v. Lee, supra. There is no indication in Public Law 83-280 or its history that there was any intention to deprive Indian tribes of their share of jurisdiction and to allow states to assume a greater share of jurisdiction, i.e., exclusive jurisdiction, than the United States Government had at the time. The object was merely to relieve the federal courts and federal prosecutors of the burdens of law enforcement in Indian country. This is particularly true in light of the canon of Indian law that "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Bryan v. Itasca County, _____U.S._____, 96 S.Ct. 2102, 48 L.Ed.2d 710, 723 (1976).

A determination that the jurisdiction assumed by states under Pubic Law 83-280 is exclusive would result in the

termination of Indian tribal governments, for there would be no powers remaining to be exercised by such tribal governments. This Court has already spoken emphatically on this issue in Bryan v. Itasca County, supra, stating that nothing in the legislative history of Public Law 83-280 "remotely" suggests that Congress meant that the Act's extension of jurisdiction to the states "should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations'." 48 L.Ed.2d at 721.

IV. THE EXERCISE OF CRIMINAL JURISDICTION BY THE SUQUAMISH TRIBE IS CONSONANT WITH EXPRESS CONGRESSIONAL AND EXECUTIVE POLICIES.

This Court noted in Bryan v. Itasca County, supra, at n.14, that "present federal policy appears to be returning to a focus upon strengthening tribal self-government," and cited several recent Congressional acts supporting this conclusion.

A number of acts passed by the Congress in the early 1950's had contemplated the termination of Indian reservations and the eventual cessation of the powers of tribal governments. However, in the 1960's there was a major reversal of this governmental policy and approach toward Indian affairs, culminating in a message to Congress by the President on July 8, 1970, indicating a policy of the strengthening of tribal sovereignty and tribal institutions. H.R. DOC. NO. 91-363, 91st Cong., 2d Sess. (1970).

In Bryan, this Court cited the following language of the Ninth Circuit in Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975):

> courts "are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected,

> particularly where to do so will interfere with the present congressional approach to what is, after all, an on-going relationship."

48 L.Ed.2d at 721, n.14.

CONCLUSION

Petitioner is attempting to convince this Court to reject notions of tribal sovereignty, tribal jurisdiction, federal policy, and legislative interpretation which support the decision below. However, Petitioner fails to acknowledge that such rejection would require this Court to overrule a long line of its decisions dealing with Indian jurisdiction, the powers of Indian tribal government, and the relationship between federal and tribal authority. Moreover, the basic principles emerging from those decisions have recently been reaffirmed in the decisions of this Court discussed above.

It should be noted that there is no decision of any other Circuit conflicting with the Ninth Circuit's decision in this case. In fact, Petitioner's allegation that this case is of such great moment and public import so as to require review by this Court is impeached by the notable absence of litigation in other courts concerning this subject matter, despite the exercise of jurisdiction by Indian tribes over non-Indians throughout the nation over the past several years.

It is evident that the issues in this case do not presently merit Supreme Court review. Perhaps, if other decisions arise in other Circuits conflicting with the Ninth Circuit or dealing with further implications of such tribal jurisdiction, the Supreme Court will wish to take another look at these issues.

This Court should not review the well-reasoned and judicially sound opinion of the Ninth Circuit protecting the

right of an Indian tribe to maintain a safe and orderly community by regulating the conduct of those who choose to enter its lands.

For the reasons set out above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

Dated:
December 22, 1976

By Barry D. Ernstoff
Barry D. Ernstoff of
Attorneys for Respondents

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1976
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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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BRIEF OF GOVERNOR OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR CERTIORARI

I.

INTEREST OF AMICUS CURIAE

The State of Washington ranks sixth of all the states in the number of Indians residing within state boundaries. Approximately one percent of the state's total population is Native American. The relationship between the Indian tribes of Washington State and state and local governments, particularly with respect to the peace and security of Indian and non-

Indian citizens on Indian reservations, has been a subject of particular concern to the Governor.

In 1957, in accordance with Federal and Washington State legislative authorization, and a request by the Tribe, the State of Washington assumed jurisdiction over the Port Madison Indian Reservation of the Suquamish Tribe by a proclamation of the then Governor Albert D. Rosellini.[1] This assumption of jurisdiction occurred at a time when federal Indian policy favored "termination" of Indian tribal authority.[2]

In the period following the assumption of jurisdiction by the state, difficult problems of law enforcement on Indian reservations, including the Port Madison Indian Reservation, arose. The Washington State Legislature provided no additional funding for county or local governments to assist them in the extension of their law enforcement and other responsibilities to Indian reservations within their own jurisdictions. Complaints about inadequate law enforcement on Indian reservations within Washington State were frequent and strong, and documented in both Congressional hearings and in statements received

[1]All references herein to "Appendix" are to the appendices to the Petition for Writ of Certiorari. Congressional Authorization for the assumption of jurisdiction by the state was granted through Public Law 83-280, 67 Stat. 588 (1953), Appendix B, pp. 24-26; state legislative authorization through Revised Code of Washington Chapter 37.12 (1957), Appendix B, pp. 32-33; Suquamish Tribal request to state, Appendix B, p. 31; Proclamation of Governor Rosellini of May 15, 1958, Appendix B, p. 32.

[2]As recently as 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies.

by the Washington State Indian Affairs Task Force, a joint project of the Governor's Urban Affairs Council and the Governor's Indian Advisory Committee.[3]

In the late 1960's, both federal and state Indian policy shifted away from termination and assumption of jurisdiction by states, and toward the recognition of tribal sovereignty and the encouragement of tribal self-government. The possibility of returning to the United States jurisdiction previously assumed by a state was created by the passage of the Act of April 11, 1968, 82 Stat. 79, 25 U.S.C. § 1323, authorizing the United States to accept retrocession. The Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, provided that [n]o Indian tribe *in exercising the powers of self-government* shall * * *" (emphasis supplied). The Act proceeded to enumerate the basic rights which no Indian tribe could deny "any person". The President, in his message to Congress of July 8, 1970, flatly rejected the policy of termination and called instead for "* * * a new era in which the Indian future is determined by Indian acts and Indian decisions."[4] Subsequent Congressional legislation, such as the Indian Financ-

[3]The statements given to the Washington State Indian Affairs Task Force are summarized in its 1971 report entitled *"Are You Listening Neighbor? . . ."* Illustrative testimony concerning inadequate state law enforcement on Indian reservations is found in Hearings Before the Subcommittee on Indian Affairs, on S. 2010, the Indian Law Enforcement Improvement Act of 1975, 94th Cong., 2nd Sess., U.S. Government Printing Office (1976) [hereinafter cited as 1975 Hearings].

[4]H.R. Doc. No. 91-363, 91st Congress, 2nd Sess. (1970): 116 Cong. Rec. 23131 (1970).

ing Act of 1974, 25 U.S.C. § 1451 *et seq.*, has also reflected and demonstrated the national policy favoring the strengthening of tribal governments.

In Washington State, the policy of the executive branch of state government similarly supports Indian self-determination. The Governor has supported the retrocession of jurisdiction. Consistent with that policy, when the Suquamish Tribe requested such retrocession in 1971,[5] Governor Evans issued a proclamation retroceding state jurisdiction to the United States.[6]

The policy of the Governor was set out for Congress in a statement presented on his behalf by his Administrative Assistant, James Dolliver, in hearings on the Indian Law Enforcement Improvement Act of 1975:[7]

> Our policy is, and has been, for the last nearly seven years, one of accepting, recognizing, and respecting the Tribal governments as the political, governing bodies of sovereign nations. This policy is based on the concept of self-determination of Tribal governments and the necessity for the state to have a two-way street of communication and coordination with Indian Country for its implementation.

Consonant with the state's executive policy, a number of legislative acts have recognized the desirability of treating Indian tribes as local governmental units. The Interlocal Cooperation Act, for example, includes in its definition of "public agency", any Indian tribe recognized as such by the federal government.[8] The Economic Assistance Act of 1972, authorizes the economic assistance authority "* * * to make direct grants and/or loans to political subdivisions of the state and Indian tribes recognized as such by the federal government * * *."[9] Similarly, the 1972 legislature amended the statute providing for funding of outdoor recreation programs of "public bodies" to include "Indian tribes now or hereafter recognized as such by the federal government."[10]

As noted in the Governor's motion for leave to file this amicus curiae brief, under the Washington State Constitution, "[t]he supreme executive power of this state shall be vested in a governor. * * *"[11] By statute, "[the governor] is the sole official organ of communication between the government of this state and the government of any other state or territory, or of the United States."[12] Washington State was the first state to establish an executive Office of Indian Affairs with a Special Assistant to the Governor for Indian Affairs. The Governor is further ad-

[5]Resolution of Suquamish Tribe of January 11, 1971, Appendix B, pp. 34, 35.

[6]Appendix B, pp. 35, 36. The acceptance of the retrocession by the United States, through the Secretary of the Interior, is found in Appendix B, p. 36.

[7]1975 Hearings, *supra*, note 3, at 489.

[8]Revised Code of Washington, Chapter 39.34.020.

[9]Revised Code of Washington, Chapter 43.31A.070.

[10]Laws of 1972, Chapter 56, codified as Revised Code of Washington, Chapter 43.99.020.

[11]Article III, Section 2.

[12]Revised Code of Washington, Chapter 43.06.010.

vised by the Governor's Indian Advisory Council.[13] Consistent with the state's policy supportive of Indian self-determination, the membership of this council is chosen by the state's urban, reservation, and non-reservation Indian populations themselves. The Governor's office has also participated in the work of the Governor's Interstate Indian Council, an informal advisory group which has also supported Indian self-determination and the retrocession of state jurisdiction over Indian lands.

II.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

The decision of the Ninth Circuit affirms long standing legal principles, and is wholly consistent with the previous decisions of this Court, and with federal and Washington State executive and legislative policy. First and foremost, it affirms the principle that Indian tribes retain those powers of self-government that are not expressly terminated by Congress.[14] Petitioner has pointed to no act of Congress depriving tribal courts of jurisdiction over offenses committed on tribal lands in violation of a

[13]The Governor's Indian Advisory Council was established by Executive Order 72-11, October 30, 1972, and directed to examine and define issues pertaining to the rights and needs of American Indians of the State of Washington, and to make recommendations to the governor and to state agencies with respect to desireable changes in program, policies, and law.

[14]*Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 560-61 (1833); *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1, 17-18 (1831); *Williams v. Lee*, 358 U.S. 217 (1959).

valid law and order code.[15] Rather than representing a radical departure from established law, the Ninth Circuit decision complements this Court's previous decisions involving the jurisdiction of tribal courts over non-Indians on tribal lands,[16] In *Williams v. Lee*, *supra*, note 14, characterized as a "landmark decision" in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, at 171 (1973), tribal court jurisdiction over a non-Indian was upheld with reasoning that is indistinguishable from that which must apply to the present case.

In considering whether or not to grant this petition for certiorari, it should be noted that the decision appealed from is not in conflict with any decision of another court of appeals on the same matter, is not in conflict with any applicable state law, is not in conflict with any principle of law articulated by this Court, and does not represent a departure from the accepted and usual course of judicial proceedings.

The amicus curiae brief of the Washington State

[15]The dissenting opinion of Judge Kennedy, after an extensive analysis of federal legislation, acknowledges that Congress has never explicitly withdrawn tribal jurisdiction.

[16]The Ninth Circuit's holding in the *Oliphant* case extends only to "* * * the jurisdiction of an Indian tribe over non-Indians who commit crimes *while on Indian tribal land* within the boundaries of the reservation." (Opinion, page 1; Appendix A, page 8 [emphasis added]). The amicus curiae brief of the Washington State Attorney General gives the holding too expansive a reading in suggesting its applicability to non-trust as well as tribally owned or other trust land. The Governor expresses no view on tribal jurisdiction over the acts of non-Indians on non-trust land, believeing that question not to be properly before the Court. While the petition of Mr. *Belgarde* does involve non-trust land, for the reasons stated in the Brief of Respondents, the Governor agrees that the issue should not be addressed by this Court until the Ninth Circuit has had the opportunity to consider it.

Attorney General suggests, at page 11, that the 1878 district court decision in *Ex Parte Kenyon*, 14 Fed. Cas. 353, "* * * has represented the law on this subject for nearly 100 years." However, as this Court noted in *Elk v. Wilkins*, 112 U.S. 94 (1884), the *Kenyon* decision concerned an activity that occurred *outside* a reservation. Similarly, the statement in the dissenting opinion below that "* * * virtually no white man appears to have been tried by an Indian tribunal in the past century * * *" (Appendix A, p. 27) is without basis in the record or in fact.[17] In Washington State alone, a number of Indian tribes routinely try and penalize non-Indians for offenses against their tribal law and order codes.[18] It is the belief of the Governor that this development has and will continue to contribute to the peace and security of all the citizens of this state and will con-

[17]The dissenting opinion appears to have drawn this inference from the absence of federal decisions on the subject. However, after this Court's decision in *Talton v. Mayes*, 163 U.S. 376 (1896), and until the Indian Civil Rights Act of 1968, 25 U.S.C. § 1303, no mechanism existed to allow the federal courts to review the assertion of jurisdiction by an Indian tribe over a non-Indian.

[18]The fact that a number of tribes in Washington State (including tribes over whose reservations the state assumed jurisdiction under Public Law 83-280, and tribes over whose reservations the state's assumption of jurisdiction was retroceded to the United States) routinely assert jurisdiction over non-Indians for offenses against their law and order codes on tribal lands, without particular problems or objections, was confirmed in inquiries by the Special Assistant to the Governor for Indian Affairs to tribal attorneys, tribal officials, and officials of the Bureau of Indian Affairs in the Portland, Oregon, area office and the Western Washington Agency in Everett, Washington. The Governor believes that one of the reasons this Court should decline to review the present case is the absence of a record to demonstrate the extent to which and the manner in which Indian tribes have been exercising such jurisdiction. All such jurisdiction is, of course, exercised subject to the 1968 Indian Civil Rights Act, 25 U.S.C. §1302, limiting the penalty or punishment by tribes to fines of no more than $500 and imprisonment for no more than six months, and guaranteeing defendants due process rights.

tribute to the clarification of inter-governmental relationships that will ultimately have to be resolved by Congress.

The decisions of this Court have repeatedly recognized that the Congress has the power to define the relationship between the Indian tribes, the states, and the United States. The statement presented on behalf of Governor Evans in the Hearings on the Indian Law Enforcement Act of 1975, referred to above, suggest that further definition of these relationships should be made by Congress, not by the courts:[19]

> Congress must look carefully at federal Indian policy and consider the practical effect on state laws and on all state citizens. The issues of federal, state and Indian relationships can not and should not be settled in court. Rather, this is one area that will require bold, concise and equitable policy by Congress in the most expeditious way possible.
>
> The State of Washington fully believes in self-determination for the Indian people in its state. By the accident of geography both Indian and non-Indian live within the borders of the same state. To live together in peace and harmony, to be mutually supportive and to determine our own future is the goal of Indian and non-Indian alike. While treaties will continue to be subject to judicial and congressional interpretation, and while there will continue to be the tensions between different jurisdictions, we have far more that unites us and far more reason for cooperation than confrontation. There is no more urgent role for Congress to fulfill than to work with federal agencies, Indian people, states and

[19]1975 Hearings, *supra*, note 3, at 493.

local governments to define clearly and accurately the jurisdictional and governmental relationships. With this we believe the full resources of state services can be made available to Indian people and the goal of Indian self-determination and self-sufficiency can be attained.

The holding of the Ninth Circuit in this instance is consistent with and bolsters the present policy of the State of Washington to bring tribal government more closely within the fabric of inter-governmental relationships and powers, and assures to the tribes the jurisdiction over their own lands which is a necessity for the assumption of responsible self-government.

Governor Evans believes that the denial of a writ of certiorari in this case will leave a governing principle of law that is clear, sound, and fair. In the unlikely event that another court of appeals were to reach a contrary conclusion, this Court could resolve the conflict with the advantage of having additional facts and experience concerning the assertion of jurisdiction over non-Indians by tribal courts that, presumably, will develop in the coming years. In the meantime, if Congress wishes to clearly establish a different rule, it can do so after viewing the experience with those tribes which prepare themselves to and do exercise jurisdiction over acts committed upon tribal lands.

III.

CONCLUSION

For the foregoing reasons, Governor Evans asks the Court to deny this petition for writ of certiorari.

DATED this 11th day of January, 1977.

Respectfully submitted,

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I hereby certify that on this 11th day of January, 1977, I served a copy of the Brief of Governor of the State of Washington as Amicus Curiae in Opposition to Petition for Certiorari by mailing, postage prepaid, to Philip P. Malone, Attorney at Law, 153 First Avenue, Poulsbo, Washington 98370, attorney for petitioners; Ron Sims, Acting United States Attorney, 1012 U.S. Courthouse, Seattle, Washington; Richard Neely, Regional Solicitor, Department of the Interior, P.O. Box 3621, Portland, Oregon; Robert H. Bork, Solicitor General, Room 5143, Justice Building, Washington, D.C.; John C. Merkel, Kitsap County Prosecuting Attorney, Kitsap County Courthouse, 614 Division Street, Port Orchard,

Washington 98366; and Barry Ernstoff, Ziontz, Pirtle, Morisset, Ernstoff and Chestnut, 200 Pioneer Building, 600 First Avenue, Seattle, Washington 98104. I further certify that all parties required to be served have been served.

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IN THE

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October Term, 1976

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OBJECTION OF PETITIONERS TO: MOTION OF GOVERNOR OF STATE OF WASHINGTON FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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10

IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners object to the "Motion Of Governor Of State Of Washington For Leave To File Brief As Amicus Curiae" for the following reasons:

MOTION NOT FAVORED BY SUPREME COURT RULE

1. The motion made by Daniel J. Evans was made by him as the incumbent Governor of the state of Washington, through a "Special Assistant Attorney General" appointed by him and not regularly employed by the Attorney General of the state of Washington at a time when his term as Governor was to expire as of 12:00 p.m. noon on January 12, 1977 and the term of the present Governor, Dixy Lee Ray, was to commence for four years. If leave is granted by the Court for the former Governor to file such brief, then at the time the Court grants such leave and considers his brief the Court will be granting leave and considering the brief of a private person--perhaps, contrary to present and/or future views or policies of the present Governor which she may desire to effect for the state of Washington. The motion of the former Governor of the state of Washington to which the Petitioners object is not made for the state of Washington but by and for the Governor "to present the Court with a separate and different view" of his while acting as Governor,[1] "sponsored" for the Governor and not for the state of Washington contrary to Supreme Court Rule 42.4. Supreme Court Rule 42.1 provides: "SUCH MOTIONS ARE NOT FAVORED".

STATE OF WASHINGTON REPRESENTED BY ATTORNEY GENERAL

2. The Attorney General of the state of Washington while an executive officer of the state of Washington under the state of Washington Constitution (Article 3 Sec. 21) not only is a "legal adviser" to state officers, including the Governor, but also by constitutional mandate is obligated to perform such other duties as may be prescribed by law. As an elected official of the state of Washington the first general power and duty authorized by the law of the state of Washington is for the Attorney General to: "Appear for and represent the state before the supreme court in all cases in which the state is interested."[2]

The "Brief Of The Attorney General Of The State of Washington As Amicus Curiae In Support Of Jurisdictional Statement", on file herein, was filed by the Attorney General, Slade Gorton, in compliance with such law representing the state of Washington and not just as a "legal adviser" and sponsor obliging the office of the Governor through whom the former Governor desires to express to the Court a separate and different view.[3]

1/ Page 2, paragraph one: "Motion Of Governor Of State Of Washington For Leave To File Brief As Amicus Curiae/"

2/ Laws of the state of Washington, Revised Code of Washington, Chapter 43.10.030, General Powers and Duties: (1)

3/ Supra, note 1 hereof. The Attorney General appears on the motion and brief as a "legal adviser" to the Governor in accordance with the state of Washington Constitution, Article 3 Sec. 21), and as a sponsor in accordance with the Rules of Supreme Court 42.4 which reads: "Consent to the filing of a brief of an amicus curiae need not be had when the brief is presented . . . . for a State . . . . or for a political subdivision of a State . . . . sponsored by the authorized law officer thereof." (Emphasized)

NO FACTS OR QUESTIONS OF LAW SET FORTH

3. The motion for leave to file the "Brief Of Governor Of State Of Washington As Amicus Curiae In Opposition to Petition For Certiorari", received with the brief by the Petitioner's attorney on the 12th day of January, 1977, does not comply with Rule 42.3 of the Supreme Court. It does not set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be presented by the parties, and their relevancy to the disposition of the case. The Governor is not the state of Washington. He may have an opinion as Governor as well or better than anyone else of what the interests of the state of Washington are and, while acting as Governor, he may have formulated policies of the executive branch of the government of the state of Washington, but such expression of views and policies by a brief to be filed herein will not be facts or questions of law that are relevant to the issues in this case. There is neither statements in the motion of the former Governor of facts or questions of law relevant to issues presented in this case, nor that the Governor at the time the motion was made has reason for believing that any facts or questions of law will not be adequately covered by the parties.

VIEWS AND POLICIES NOT RELEVANT

4. While the brief of the former Governor shall urge the Court that the policy of the executive branch of the government of the state of Washington, while he was Governor, supported Indians and Indian Tribes in the state of Washington to foster self determination over their affairs, and shall urge the Court in furtherance of such policy to deny the Writ of Certiorari herein and wait for future determination until the dust settles on the

holdings of the Oliphant and Belgarde case for further legal conflict that may arise between non-Indians and tribes exercising jurisdiction over non-Indians on reservations, such arguments are not relevant and have no merit. The executive policy of the federal or state government may foster self-determination for tribes for its members, but the consideration of such policy does not aid or answer as a question of law for this Court whether a non-Indian on an Indian reservation is subject to the independent jurisdiction of an Indian Tribe for an alleged tribal-criminal violation by him on that reservation.

NO MERIT FOR DELAY BY DENYING PETITION

5. The holdings in the Oliphant and Belgarde case represent the first pronouncement of any law in the history of the laws of the United States that an Indian Tribe has independent sovereign criminal jurisdiction without the consent of the United States, either through laws of the United States, orders of the President, or holdings of a court of competent jurisdiction, over non-Indians for actions of non-Indians on an Indian reservation. There is no merit that this Court should wait and see the results of such recent holdings while many non-Indians as citizens of the United States must experience additional new-found laws and the application of such laws to their persons and freedom by Indian Tribes representing a small minority extending their powers under a policy of self-determination over a majority of the population of non-Indians on Indian reservations without either their personal or representative consent.

FOR THE PARTIES TO SEEK TO ATTAIN JUSTICE IN LAW BY A PETITION FOR HEARING BEFORE THIS COURT (AND AS A RESULT IN TURN, PERHAPS, OBTAIN JUSTICE FOR MANY OTHERS) THE HEARING THEREOF SHOULD NOT BE DENIED AS A MATTER FOR FUTURE JUDICIAL EXPERIMENT.

POLICIES AND VIEWS OF THE FEDERAL AND STATE EXECUTIVES MAY CHANGE DURING WHICH THE RIGHTS OF INDIVIDUAL CITIZENS IN ACCORDANCE WITH THE LAW SHOULD REMAIN PROTECTED.

Therefore, it is requested by the Petitioners, through their attorney, that this Court deny the motion of the former Governor of the state of Washington and that the Petitions of the Petitioners herein be granted.

Respectfully submitted,

Philip P. Malone

PHILIP P. MALONE,
Attorney for Petitioners in
Forma Pauperis

I hereby certify that on this 14th day of January, 1977, the original for filing and one copy for return, of "Objection of Petitioners to: Motion of Governor of State of Washington for Leave to File Brief As Amicus Curiae" was mailed postage paid, to the Clerk of the United States Supreme Court, Washington, D. C. and one copy mailed postage paid, to the following: Barry Ernstoff, Ziontz, Pirtle, & Morisett, 200 Pioneer Bldg., 610 1st Avenue, Seattle, Washington 98104, attorneys for Respondents; Ron Sims, Acting United States Attorney, 1012 U. S. Courthouse, Seattle, Washington; Richard Neely, Regional Solicitor, Department of the Interior, P. O. Box 3621, Portland, Oregon; Robert H. Bork, Solicitor General, Room 5143 Justice Building, Washington, D. C.; Frederick L. Noland, Special Assistant Attorney General for Governor of the state of Washington, Daniel J. Evans, 1500 Hoge Building, Seattle, Washington 98104; Slade Gorton, Attorney General of the state of Washington, Temple of Justice, Olympia, Washington 98504; Edward B. Mackie, Deputy Attorney General of the state of Washington, Temple of Justice, Olympia, Washington 98504; John C. Merkel, Prosecuting

Attorney of Kitsap County, Kitsap County Courthouse, Port Orchard, Washington 98366. I further certify that all parties required to be served have been served.

Philip P. Malone

PHILIP P. MALONE,
Attorney for Petitioners in
Forma Pauperis

Supreme Court, U. S.
FILED
SEP 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT AND
DANIEL B. BELGARDE,

Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

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MARK DAVID OLIPHANT AND
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THE SUQUAMISH INDIAN TRIBE, ET AL.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

In *Oliphant v. Schlie, et al.*, the memorandum opinion of the United States District Court for the Western District of Washington, filed April 5, 1974, is unreported. A copy of that decision is at pages 48-52 of the Appendix. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 544 F.2d 1007 (9th Cir. 1976). It is reprinted in the Appendix at pages 55-73.

In *Belgarde v. Suquamish Indian Tribe, et al.*, the Report and Recommendation of the United States Magistrate, United States District Court for the Western District of Washington, dated August 1, 1975, is printed at pages 110-121 in the Appendix. The District Court's order adopting the Magistrates' recommendations in full, dated August 18, 1975, is contained in the Appendix at pages 122-123.

JURISDICTION

The judgment of the United States Court of Appeals was entered in *Oliphant* on August 24, 1976. Jurisdiction of this Court was invoked under 28 USC §1254(1).

In *Belgarde*, the United States District Court entered judgment on August 22, 1975. The record was filed with the Court of Appeals, *Belgarde v. Suquamish Indian Tribe, et al.*, 9th Cir., Cause No. 75-3319, and jurisdiction of this Court was invoked under 28 USC §1254(1) pursuant to Rules 20 and 23(a) of the Supreme Court.

QUESTIONS PRESENTED

I.

WHETHER NON-INDIANS WHILE ON THE PORT MADISON INDIAN RESERVATION IN THE STATE OF WASHINGTON ARE SUBJECT TO CRIMINAL LAWS PROMULGATED, ENFORCED AND ADJUDICATED BY THE SUQUAMISH INDIAN TRIBE OF THAT RESERVATION THROUGH ITS TRIBAL COUNCIL, POLICE AND COURT, FOR ALLEGED OFFENSES OF THOSE LAWS BY NON-INDIANS OCCURRING WITHIN THE BOUNDARIES OF THE RESERVATION, WHEN JURISDICTION OF THE TRIBE IS EXERCISED BY IT AS AN ORIGINAL INHERENT POWER OF ITSELF AS AN INDEPENDENT

SOVEREIGN NATION ACTING TERRITORIALLY WITHIN THE BOUNDARIES OF THE RESERVATION AND WITHOUT EXPRESSED AUTHORITY OF THE CONSTITUTION OF THE UNITED STATES, THE TREATY OF THE UNITED STATES WITH THAT TRIBE ESTABLISHING THE RESERVATION, THE LAWS OF THE UNITED STATES OR THE STATE OF WASHINGTON?

II.

WHETHER WHEN THE UNITED STATES, HAVING PLENARY POWER AND POWER BY LAW OVER CRIMES ON AN INDIAN RESERVATION FOR OFFENSES OCCURRING BETWEEN NON-INDIANS AND INDIANS, EXCLUDING THE JURISDICTION OF THE STATE WHEREIN THE RESERVATION IS LOCATED, PROHIBITS THE TRIBE BY EXPRESSION OR IMPLICATION FROM EXERCISING SUCH JURISDICTION CONCURRENTLY WITH THE UNITED STATES OVER THOSE OFFENSES OCCURRING WITHIN THE RESERVATION UNDER THE LAWS OF THE UNITED STATES AND THE UNITED STATES CONSTITUTION?

III.

WHETHER SUCH SOVEREIGN CRIMINAL POWER AND JURISDICTION THAT THE SUQUAMISH INDIAN TRIBE MAY HAVE HAD OVER CRIMINAL OFFENSES BY OR AGAINST NON-INDIANS IN THE STATE OF WASHINGTON TERMINATED BY THE LAWS OF CESSION OF THAT POWER BY THE UNITED STATES TO THE STATE OF WASHINGTON, COUPLED WITH THE ACCEPTANCE BY THE LAWS OF THE STATE OF WASHINGTON OF THAT POWER AND THE PETITION AND CONSENT OF THE TRIBE TO SUCH CESSION AND ACCEPTANCE OF JURISDICTION PRIOR TO THE EXERCISE OF SUCH POWER BY THE TRIBE?

IV.

WHETHER, IF SUCH CRIMINAL POWER AND JURISDICTION THE SUQUAMISH INDIAN TRIBE MAY HAVE HAD

OVER CRIMINAL OFFENSES BY NON-INDIANS HAD TERMINATED AS PROVIDED IN QUESTION 3. HEREOF, SUCH TERMINATION WAS RESCINDED UPON A SUBSEQUENT PROCLAMATION BY THE GOVERNOR OF THE STATE OF WASHINGTON PROVIDING FOR RETROCESSION OF THE CRIMINAL JURISDICTION OF THE STATE OF WASHINGTON TO THE UNITED STATES WITH LIMITATIONS THEREIN BY REFERENCE TO THE LAWS OF THE STATE OF WASHINGTON, AND THE ACCEPTANCE OF RETROCESSION BY THE SECRETARY OF INTERIOR OF THE UNITED STATES, LIMITING SUCH ACCEPTANCE TO THOSE LAWS AS PROVIDED IN THE GOVERNOR'S PROCLAMATION.

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STATEMENT OF CASE

This is an appeal from the denial of habeas corpus relief to Mark David Oliphant and Daniel B. Belgarde, charged with violations of the Suquamish Tribal Law and Order Code. (A. 41, 42, 88, 90). Both men were arrested by tribal police within the confines of the Port Madison Indian Reservation, but only Oliphant's alleged violations occurred on tribal trust land. (A. 9, 48, 76, 77, 110, 111; *Belgarde* R. 111, 115). Petitioners are non-Indians and reside on the reservation. (A. 8, 48, 75, 108, 110; *Belgarde* R. 113).

Respondents are the Chief of Police for the City of Bremerton, Washington, the Secretary of Interior (Secretary), the Suquamish Indian Tribe, Chairman of the Suquamish Tribal Council, the Suquamish Tribal Manager, a tribal police officer, two tribal judges, and the Superintendent of the Western Washington Tribal Agency.[1] (A. 8, 27, 74).

[1] The Chief of Police and the Secretary were dismissed by the United States District Court. (A.49,113,122; *Oliphant* R.55,56; *Belgarde* R.36)

The statement of the case will be set out in the following format. First, a brief description of the Port Madison Reservation. Second, a synopsis of the pertinent federal, state and tribal governmental acts. Finally, the circumstances and prior proceedings in the matters at bar.

At this time the Court should be informed that the factual matters contained herein are presented in the light most favorable to Petitioners. Petitioners have consistently made and supported these factual allegations, and they have largely gone uncontested. Nevertheless, neither the United States District Court nor the Court of Appeals made thorough findings on these matters, and absent proof to the contrary in the record, Petitioners' statement of facts should be controlling.

A. Port Madison Reservation

The Port Madison Reservation is located on Puget Sound in Kitsap County across from Seattle, Washington. There are approximately seven thousand two hundred and seventy-six (7,276) acres within the reservation boundaries. (A. 29, 75). Forty-one acres are held as tribal community land of which thirty-six acres were leased in 1969 to a non-Indian corporation for a term of fifty years. (A. 29, 48). The remaining five acres of communal land are occupied by the terms of a lease with the American Legion, a "ballpark" and a cemetery. (A. 29). The other reservation property consists of roads and public highways maintained by Kitsap County and the State of Washington, allotted land belonging to Suquamish Indians, and land owned in fee simple by non-Indians. (A. 28, 75, 111). Of the total reservation property non-Indians own five thousand two hundred and thirty-one (5,231) acres, or approximately 67 per cent. (A. 29, 47, 75; *Oliphant* R. 53, Maps 4-7, R. 54, Exhibit 5; *Belgarde* R. 78, Exhibit A).

The Suquamish Indians have not had a tribal community at Port Madison for quite some time. (A. 27-29, 46, 75). Suquamish is the only town of any consequence and it is unincorporated. (A. 29). Suquamish is inhabited by Indians and non-Indians owning commercial and residential property in the town, and this property is zoned and taxed by Kitsap County. (A. 29, 46, 75; *Oliphant* R. 53, Maps 4-7).

Non-Indians at Port Madison are subject to the civil and criminal jurisdiction of Kitsap County and the State of Washington. (A. 24, 29, 30, 77, 110). Public facilities such as roads, schools and fire protection are maintained by the State of Washington or the County. (A. 29, 75, 111). The full discussion of the jurisdictional history of the area in the brief of Kitsap County is incorporated herein.

There are about fifty members of the Suquamish Tribe enrolled at Port Madison. (A. 30, 45, 75). By contrast there are almost three thousand (3,000) non-Indians residing on the reservation. (A. 30, 47, 75).

B. Synopsis

1855 Port Madison Indian Reservation established with the signing of the *Treaty of Point Elliott*, 12 Stat. 927 (1859). The treaty contained no expressed reference to tribal jurisdiction over non-Indians, but it did empower the President to allot tribal lands. (Appendix to brief pages 6a-12a).

1887 General Allotment Act passed, 24 Stat. 388 (1887). This law provided: tribal trust lands could be allotted to Indians; patents would eventually issue on the lands so allotted; Indians to whom patents were issued "shall have benefit of and be subject to the laws" of the state in which they reside; and United States citizenship was extended to Indians given patents to allotted land.

1889 Congress admits Washington to statehood, 25 Stat. 676 (1889). The enabling act provided that Washington should disclaim all jurisdiction over Indian country. Pursuant to the enabling act Article XXVI of the Washington Constitution disclaimed jurisdiction over Indian lands. The Washington Constitution also designated the state legislature to enact, amend and repeal state laws. RCW Const. Art. III; RCW Const. Amend. 26. (Appendix to brief page 32a).

1905 Second and last agreement between the Suquamish and the United States is signed, 33 Stat., 1078 (1905). (Appendix to brief page 12(a). This was not a treaty. It concerned cession of land and was in the nature of a contract between the United States and individual male members of the tribe; no chief or other official spoke for the Suquamish.

1910 By 1910 all reservation lands, except for forty-one acres of tribal trust land, were allotted to individual members of the Suquamish tribe. (*Oliphant* R. 53, Map 3.)

1916 First Suquamish Constitution passed. This was a simple instrument and did not address the question of tribal jurisdiction over non-Indians (Appendix to brief page 4a).

1934 Indian Reorganization Act becomes law, 48 Stat. 984 (1934). This act authorized reservation tribes to incorporate and function as local governmental units. Section 16 of the act licenses organizing tribes *with all the power vested in any Indian tribe by existing federal law,* 25 U.S.C. §§476 and 477 (Appendix to brief pages 16a-17a).

1953 Congress enacts Public Law 83-280, 67 Stat. 588 (1953). This law allowed certain states, like Washington, to assume exclusive criminal and civil jurisdiction over Indian reservations by constitutional amendment or legislative enactment; with other states, assumption of jurisdiction was mandatory. (Appendix to brief page 17a).

1957 Washington legislature passed Laws of 1957, chapter 240. (Appendix to brief page 19a). This statute authorized

the governor, by proclamation, to assume jurisdiction over Indian reservations if requested to do so by the respective Indian peoples.

1958 By unanimous vote of *twenty-one members,* the Suquamish Tribal Council passed a resolution asking the governor to assume jurisdiction over Port Madison. (Appendix to brief page 58a-60a).

1958 May 15, Governor Rossellini proclaimed, effective June 14, 1958, the Port Madison Reservation and *all persons* residing on it under the criminal and civil jurisdiction of the state of Washington. (Appendix to brief page 60a).

1963 Washington legislature amended in part and repealed in part Laws of 1957, chapter 240, with enactment of Laws of 1963, chapter 36. RCW 37.12.010 *et seq.* (Appendix to brief page 20a). With this amendment the legislature, without executive proclamation, assumed exclusive jurisdiction over *all persons* within Indian country, *except* Indians on trust lands where none of the following subject areas were involved: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon public streets. In other words, unless one of the eight subject categories was involved Washington did not assume jurisdiction over Indians on trust lands, but this was the only group of persons over whom jurisdiction was not assumed. The 1963 law also provided that tribes having previously come under state jurisdiction pursuant to the 1957 statute, *such as the Suquamish,* were not to be affected; i.e., they were to remain totally under state jurisdiction.

1964 Suquamish adopt the current tribal constitution and by-laws. (Appendix to brief pages 4a-6a). The constitution limits tribal membership to persons of Suquamish blood, and also vests governmental power in the tribal council. All

legislation is to be passed either by the tribal council, or by referendum in which only tribal members can vote. As of January 1974, there were only twenty-two Suquamish eligible to vote. (A. 46). *Non-Indians cannot become tribal members, they cannot vote and they are effectively excluded from tribal government.*

1965 The Suquamish Constitution was approved by the Secretary, and they became a federally recognized tribe under the Indian Reorganization Act of 1934. As approved by the Secretary, the tribal constitution authorized the tribal government to promulgate and enforce regulations *governing only certain conduct of tribal members.* This is found in section (h) of the constitution. (Appendix to brief page 5a).

1968 Indian Civil Rights Act passed, 82 Stat. 77 (1968). Among other things this law *permitted states* to retrocede to the federal government *all or any measure* of jurisdiction assumed over Indian country pursuant to Public Law 83-280. 25 U.S.C. §1323. This law also extended *certain due process* requirements to all persons subject to Indian tribes exercising powers of self-government, and limited penalties imposed by Indian tribunals to six months imprisonment or a fine of $500.00, or both. 25 U.S.C. §1302. (Appendix to brief pages 17a-19a).

1968 November 12, President Johnson, by executive order, designated the Secretary to accept any retrocessions by publication in the Federal Register of *the jurisdiction retrocede* and the effective date. Executive Order No. 11435, 33 F.R. 17339.

1969 Suquamish lease all their remaining tribal lands, except for 5 acres occupied by the American Legion, a "ballpark" and cemetery, to a non-Indian corporation for a term of fifty years. According to the terms of the lease, both parties had joint use of the "ballpark". (*Oliphant* R. 54, Exhibit 5; R. 53 Map 6).

1971 The Suquamish, *by unanimous vote of twenty-nine members,* resolve to have jurisdiction returned to the United States. (Appendix to brief page 61a-62a).

1971 Governor Evans, *without legislative approval,* proclaimed that any jurisdiction exercised by the State of Washington over Port Madison, "*except as provided under Chapter 36, Laws of 1963* (RCW 37.12.010 - 37.12.060, is retroceded to the United States." (Emphasis added) (Appendix to brief pages 62a-64a).

1972 The Secretary accepts the governor's retrocession *as qualified.* 37 F.R. 7353 (Appendix to brief pages 64a).

1973 April 1, the Secretary issues revised law and order regulations governing Indian reservations, 25 C.F.R. §§11.1 *et seq.* These regulations authorized tribes organized under the Indian Reorganization Act to adopt their own tribal codes. But the codes must comply with the tribal constitution, and they also have to be approved by the Secretary. *Id.* at §11.1(d) and 11.1(e) (Appendix to brief page 66a).

1973 Suquamish adopt their tribal Law and Order Code. (Appendix to brief pages 21a-47a). This code regulates conduct by Indian and non-Indian alike, and it covers a variety of offenses, everything from assault, bigamy and rape to theft. Defendants are entitled to a jury trial, but the Suquamish, by vote of *thirty-two members,* passed Tribal Resolution No. 77-065 to exclude non-Indian from the jury panel. (Appendix to brief page 65a). This code has never been approved by the Secretary.

C. Circumstances and Prior Proceedings

Shortly after enactment of the tribal code, on August 19, 1973, during a tribal celebration known as "Chief Seattle

Days",[2] petitioner Oliphant became involved in an altercation with another man. (A. 9, 41, 48). The incident occurred at the "ballpark" on tribal trust land. (A. 9, 48). Tribal police intervened, an officer was knocked down and Oliphant was arrested. (A. 9, 41, 42, 48).

The Law and Order Code had not been published or otherwise made available to non-Indians, and Oliphant had no knowledge of its existence. (A. 9, 79). Nevertheless Oliphant was arrested and locked in a room without food, heat, bed or toilet facilities for six hours before he was brought before a tribal judge. (A. 9, 41, 42).

Before the tribal court Oliphant, who was without counsel, was arraigned and charged with assaulting an officer and resisting arrest. (A. 9, 41, 42). At this hearing no presentation was made by either the tribal police or other witnesses as to the incident for which Oliphant was arrested. (A. 9). By order of the tribal court, in lieu of bail, Petitioner was transported to Bremerton, Washington[3] and incarcerated in the city jail.[4] (A. 9, 11, 48).

While he was being held at Bremerton, both Oliphant and his wife were visited by the Suquamish Tribal Manager and a tribal police officer who demanded that the Oliphants sign over title and possession to their automobile in order to secure Petitioner's release. The Oliphants refused. (A. 31).

[2] "Chief Seattle Days" was originally sponsored by the American Legion and everyone could participate. In 1973 the Suquamish Tribe took over the event and limited sponsorship and participation to Indian programs only. (A.46).

[3] Oliphant was transported to Bremerton in an automobile supplied or furnished by the Bureau of Indian Affairs. (A.9).

[4] By agreement entered into with the Bureau of Indian Affairs, Bremerton serves as a holding facility for the tribal court. (A.13). The United States funds the administration of justice on the Port Madison Reservation. 25 USC §§450 *et seq*; (*Oliphant* R.65, Exhibit 1).

Oliphant retained counsel and petitioned the United States District Court for the Western District of Washington for a writ of habeas corpus on August 23, 1973. (A. 8). August 24, Oliphant was released on his own recognizance after signing an agreement to appear. (A. 15, 38). It took the tribal court five days to determine that Oliphant had sufficient "family ties" in the community to release him on his own recognizance. (A. 15).

A supplemental petition was filed in federal court September 11, 1973. (A. 27). The tribal court stayed prosecution pending outcome of the habeas corpus action, and Oliphant still remains to be tried. (A. 49).

In his habeas corpus petitioners Oliphant alleged that the tribal court had no jurisdiction over non-Indians, and that subjecting him to the jurisdiction of the tribal court denied him due process as guaranteed by the United States Constitution.

United States District Judge Sharp entered an order to show cause (A. 39), and directed all parties to respond to the following subject:

1. Description of the various Indian lands, both Trust and non-Trust, involved in the present controversy and an analysis of their present status.
2. Description of the Suquamish Indian Tribe as presently constituted and the status of its members in relations to the lands in controversy.
3. Authority of the Suquamish Indian Tribe to promulgate its Code of Laws, * * *.
4. Description of federal or state statutes or regulations, if any, which have limited or restricted the sovereign power of the Suquamish Indian Tribe.

The matter came on for hearing and petitioner complied with the order to show cause. (A. 44, 47) (*Oliphant* R. 53, Maps 1-7). At the close of the hearing Judge Sharp denied the writ. A memorandum opinion and appropriate order were

subsequently entered, April 5, 1974. (A. 48, 53). In his memorandum opinion Judge Sharp found, *inter alia*, that Oliphant was subject to the jurisdiction of the tribal court, and that Petitioner had been accorded all the protections available to him under the Indian Civil Rights Act of 1968. (A. 52).

April 30, 1974, an appeal was taken, (A. 54), and on appeal Oliphant again alleged that the tribal court was without jurisdiction over non-Indians, and that subjecting him to the authority of a tribal government in which non-Indians had no participation violated his constitutional rights.

A panel of the United States Court of Appeals for the Ninth Circuit affirmed in a 2-1 decision, August 24, 1976. *Oliphant v. Schlie*, 544 F.2d 1007 (1976), The Circuit Court affirmed solely as to jurisdiction, and did not reach Petitioners' entire due process claim.[5] Judge Kennedy filed a dissenting opinion.

Petitioner Belgarde was arrested in the town of Suquamish on October 12, 1974. (A. 76, 110). According to the tribal police reports, Belgarde had been recklessly driving his pick-up at speeds "immensely exceeding the speed limit of 25 mph" on the streets of Suquamish for several hours with two tribal police cars in hot pursuit. (A. 107, 109, 110).

After a two hour "chase" the tribal police succeeded in blocking the road by pulling 20 feet in front of Belgarde as his truck slowed down to almost a stop. (A. 77, 107). Unavoidably, the pick-up collided with the police car. (A. 77). The officers emerged from their vehicles, fired a shot, pulled Belgarde and his companions from the truck and handcuffed them. (A. 77, 107, 108).

[5]The only finding the Court of Appeals made as to due process concerned exclusion of non-Indians from the venire. The Court reasoned this issue was raised prematurely, *supra* at 1011-1012.

Belgarde's companions were Mark Oliphant and Brad Bray. At that time Oliphant was awaiting appeal to the Ninth Circuit from the District Court's denial of his writ of habeas corpus. The tribal police released Oliphant and Bray, but they arrested Belgarde for recklessly endangering another person and injuring public property. (A. 77, 78, 108, 110).

The tribal officers then called the Kitsap County Sheriff. (A. 108, 111). A deputy sheriff arrived at the scene and called the State Patrol. (A. 108). The state patrolman arrived, conducted an investigation and made out an accident report. (A. 108, 111). Due to the tribal police officer's assertions of jurisdiction, neither the deputy sheriff nor the state policeman interferred in the matter. (A. 77, 108, 111).

Belgarde was taken to the tribal office in Suquamish where the officers filled out Temporary Orders of Commitment. (A. 77, 88, 90). A tribal judge had signed the blank orders, which are assertions that probable cause exists to arrest the defendant, prior to the incident, so the tribal officers merely completed them. (A. 78). According to these orders Belgarde was charged with destruction of *private property* and *"wreakless driving"*. (A. 88, 90). Pursuant to these orders Belgarde was transported sixty miles to Port Angeles, Washington and jailed.[6] (A. 78, 108, 111). He posted bail the same day and was released by the tribal court. (A. 78, 111).

Belgarde had to inform himself of the time set for arraignment. However, he appeared at the hearing on October 18, 1974 with an attorney. (A. 78, 111). The arraignment was held in the back of a former barber shop in an area roughly 8' x 10', not physically capable of handling a fair, free and public trial or hearing. The presiding judge appeared to have little knowledge, training or practice in law.[7] The remainder

[6]By compact entered into with the Bureau of Indian Affairs, Port Angeles also serves as a holding facility for the tribal court. (A.91).

[7]No transcript was made of these proceedings.

of the barber shop was occupied by the tribal police and other persons openly hostile to Belgarde. (A. 78, 79).

Belgarde was charged with endangering the life of another and destruction of public property. (A. 79, 111). The tribal court notified Petitioner's attorney that no one could appear as counsel for a defendant until he paid a fee to the tribal court and had been accepted by the "Chief Judge". (A. 79).

November 6, 1974, Belgarde filed a petition for writ of habeas corpus. (A. 74). The tribal court stayed further prosecution and Petitioner still remains to be tried. (A. 79, 111).

In his habeas corpus petitioner Belgarde contended that the tribal court lacked the requisite jurisdiction over non-Indians, and alleged, among others, the following denials of due process: (1) the law and order code had not been published and petitioner had no knowledge of it; (2) the tribal court facilities were not adequate for a fair public trial or hearing; (3) petitioner could not receive a fair trial because all the judges and jurors were Indians; (4) petitioner had not been timely advised of the charges against him; and (5) *petitioner could not be subject to the authority of a government in which non-Indians could not participate.*

The matter was assigned to a magistrate for findings and recommendations. (A. 93). An order to show cause was issued and the matter heard. (*Belgarde* R. 34, 76). The magistrate, relying heavily upon the District Court's decision in *Oliphant*, found the tribal court had jurisdiction notwithstanding the alleged violations having occurred on state and county highways. The magistrate proceeded to recommend that the writ be denied, and that the due process allegations were either frivolous or could be raised later in post conviction relief. (A. 110-121).

District Judge Sharp adopted the magistrates recommendations in full and denied the petition. (A. 122, 124). September 4, 1975, notice of appeal was filed (A. 125), and

the parties stipulated to hold the appeal in abeyance pending a decision in *Oliphant*, then before the Circuit. (A. 126). The Court of Appeals entered an order staying the appeal. (A. 128).

Following the Circuit's decision in *Oliphant*, the record in *Belgarde* was filed in the Court of Appeals, *Daniel B. Belgarde v. The Suquamish Indian Tribe et al.*, Cause No. 75-3319, and both defendants petitioned for a writ of certiorari and moved for leave to proceed in forma pauperis.

A writ of certiorari and leave to proceed in forma pauperis was granted June 13, 1977 (A. 129). In this posture the matter now stands before the Supreme Court.

SUMMARY OF ARGUMENT

The purported basis for the exercise of tribal criminal jurisdiction over non-Indians which is asserted by Respondents, and which was relied on by the court below, is the concept of "inherent tribal sovereignty." Under this concept, the tribe has all powers of government not expressly taken away by the federal government. The full range of such powers, once sovereignty is declared a valid basis for their exercise, is awesome. Moreover, the degree and nature of powers originally possessed by Indian tribes is quite unclear. In the present case, for instance, there is no evidence that the Suquamish Tribe was a sovereign entity exercising powers over non-members either before or after the relevant treaty.

The origins of the sovereignty concept are found in cases dealing with tribes such as the Cherokees, which stood in a much different position in their early dealings with the federal government than that of the tribes in the Treaty of Point Elliot.

The concept of independent tribal sovereignty is at odds with principles of international law. The tribes do not fit the

definition of sovereign states under that body of law.

Neither do the decisions of this Court hold that a notion of inherent sovereignty is a basis for tribal power. These decisions may be classified chronologically by dividing them into three eras. They may be classified as to subject matter by looking to the jurisdictional conflict presented. No relevant cases have been presented in which the conflict is between a tribe and a non-Indian, except those in which the tribe was relying not upon inherent power but upon a specific delegation of power in a statute or treaty.

In conflicts between the federal government and tribal governments, the cases have consistently held that the tribes are not foreign states with independent powers, but that they are dependent upon the federal government and fully subject to federal regulation. Initially, in what may be called the Marshall Era, the tribes were termed "domestic dependent nations." As the nation expanded westward, the United States exercised greater regulatory powers over the tribes, which exercise was upheld by this Court. It was consistently made clear in the decisions that the semi-autonomous powers of the tribes originated in treaties if they existed at all. Late in the nineteenth century, it was expressly held that there are, in the federal system, only two sovereigns—the federal government and the states. Modern cases remain consistent with this view.

Where the conflict was between the federal government and the states, this Court from the beginning has held that state jurisdiction is precluded only by preempting federal treaties and statutes, not by inherent tribal sovereignty. The role of the states expanded, as predicted in the early decisions of this Court, as the nation grew and as tribal lands were allotted to individual Indians. The cases upholding the increasing role of the states, especially as to reservation activities involving non-Indians, are inconsistent with the claim of tribal jurisdiction asserted here.

As well as being contrary to prior case law, the sovereignty concept advanced here by Respondents is contrary to the United States Constitution and statutes. No provision of the Constitution provides for tribal sovereignty. Further, the comprehensive statutory scheme enacted by Congress to govern criminal jurisdiction in Indian country precludes any finding of tribal jurisdiction over non-Indians, no matter what original basis for such jurisdiction is asserted.

Federal jurisdiction over crimes in Indian country is provided for by 18 U.S.C. 1152. Exceptions which allow for tribal jurisdiction are made in two types of cases in which Indians are defendants, and in cases in which jurisdiction is conferred upon the tribe by treaty. The present case does not fall within any of these exceptions, and there is, therefore, no tribal jurisdiction. The effect of section 1152 is corroborated by section 1153 of the federal criminal code. This section was passed to deprive the tribes of jurisdiction over Indian defendants accused of committing major crimes. Obviously, the tribes were not considered to have had any jurisdiction over non-Indian defendants, so this jurisdiction did not need to be divested.

The history of this federal legislation shows that the tribes were never given or considered to have jurisdiction over non-Indians. As early as 1799, the federal government took jurisdiction of non-Indian offenses against Indian persons or property. This jurisdiction was retained through successive acts regulating trade and intercourse with the Indians. In 1834, Congress rejected a bill which would have established a confederation of Indian tribes and given that entity concurrent criminal jurisdiction over non-Indians. Instead, Congress reenacted the essence of the earlier acts, leaving exclusive jurisdiction with the federal government. Interpretations of this legislation, from the year of its passage through 1970, by the United States Attorney General and the Department of the Interior, confirm that it removes from the

tribes any criminal jurisdiction over non-Indians they may have had.

The jurisdiction asserted by Respondents is also not conferred by the relevant treaty. The treaty is silent with respect to criminal jurisdiction over non-Indians, and this silence cannot be construed to confer such jurisdiction.

The jurisdiction conferred upon federal authorities by sections 1152 and 1153 is supplemented by the Assimilative Crimes Act, 18 U.S.C. 13. This comprehensive statutory scheme leaves no room for tribal jurisdiction over non-Indians. Finally, the exercise of such jurisdiction would also be a denial of due process.

The tribal code which purports to exercise jurisdiction over non-Indian offenders was not approved by the Secretary of the Interior. The criminal jurisdiction provisions of the code exceed the range of authority conferred upon the tribe by its constitution, which was approved by the Secretary. The code is also contrary to duly promulgated regulations of the Interior Department.

Finally, state jurisdiction over the present offenses was authorized by Public Law 280 and assumed by the State of Washington, and such jurisdiction has not been returned to the federal government.

I.

WHETHER NON-INDIANS WHILE ON THE PORT MADISON INDIAN RESERVATION IN THE STATE OF WASHINGTON ARE SUBJECT TO CRIMINAL LAWS PROMULGATED, ENFORCED AND ADJUDICATED BY THE SUQUAMISH INDIAN TRIBE OF THAT RESERVATION THROUGH ITS TRIBAL COUNCIL, POLICE AND COURT, FOR ALLEGED OFFENSES OF THOSE LAWS BY NON-INDIANS OCCURRING WITHIN THE BOUNDARIES OF THE RESERVATION, WHEN JURISDICTION OF THE TRIBE IS EXERCISED BY IT AS AN ORIGINAL INHERENT POWER OF ITSELF AS AN INDEPENDENT SOVEREIGN NATION ACTING TERRITORIALLY WITHIN THE BOUNDARIES OF THE RESERVATION AND WITHOUT EXPRESSED AUTHORITY OF THE CONSTITUTION OF THE UNITED STATES, THE TREATY OF THE UNITED STATES WITH THAT TRIBE ESTABLISHING THE RESERVATION, THE LAWS OF THE UNITED STATES OR THE STATE OF WASHINGTON.

INDEPENDENT TRIBAL SOVEREIGNTY

Suquamish Indian Tribe on the Port Madison Indian Reservation in the State of Washington

INTRODUCTION:

The States of Washington, Montana, and Idaho became states and were admitted to the Union in 1889. Washington was formed from the Territory of Washington under a Constitution framed by delegates chosen by the people of the territory.[8] It was one of the last States to be admitted to the Union within the continental limits of the United States; it

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[8] *Revised Code of Washington (RCW), Constitution.*

was formed during a period of migration and westward expansion following the Civil War, and western Indian wars.

The Treaty of Point Elliott was signed in 1855 and accepted, ratified and confirmed by the President of the United States in 1859 following a small battle that had occurred between settlers and Indians in the area now known as the City of Seattle, Washington.[9] In the treaty two special reservations were established for the use and occupancy of the 22 tribes and bands, including the Suquamish, consisting of two sections, each of 1,280 acres; one of those special reservations being Port Madison located across the waters of Elliott Bay approximately 8 miles from the City of Seattle.[10]The tribes and bands agreed in the treaty to settle upon the special reservations within one year.[11] A general reservation was established in the treaty, now known as the Tulalip Reservation, consisting of thirty-six sections in accordance with the view stated in Article III of the treaty:

> "* * * Of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade mountains in said Territory; * * *"

There are no restrictions in the treaty providing that the reservations were not in the Territory of Washington, then under the exclusive jurisdiction of the United States; there are no reservations of powers of government of any kind by the treaty tribes and bands in the treaty.

In Article XII the treaty provides:

> "* * * nor shall foreign Indians be permitted to reside in their reservations without consent of superintendent or agent."

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[9] *Treaty of Port Elliott* (1859), 12 Stat. 927 (Appendix to brief at 11a).

[10] Id Article II.

[11] Id Article IV.

It is thus assumed that, except as to Indian members of the tribes and bands that signed the treaty, the Suquamish had no powers of government to even permit alien Indians to reside on the reservation.

The total number of Indians of the tribes and bands signing the Treaty of Point Elliott (1859) is estimated to be not more than 1,455 and of those living on the Port Madison Indian Reservation in 1902 to be not more than 163.[12] Their livelihood was largely dependent upon fishing, the curing of fish, taking of shell fish, some hunting and the gathering of roots and berries. Their travelling was mostly by canoe. They had slaves, traded in Vancouver Island, Canada, outside the dominion of the United States.[13] There is scant knowledge of their culture, customs, ways and usages and no identification of any particular area of land individual tribes and bands occupied to the exclusion of others in the Washington Territory.[14]

Since the decisions in *Oliphant* and *Belgarde* declare historically that the Suquamish Indian Tribe was before and continues after the formation of the United States as an original, independent sovereign entity with powers of government territorially over persons and things on the Port Madison Indian Reservation, in argument for the Petitioners it is necessary to consider the following: (1) The concept of independent tribal sovereignty, its application to the Oliphant-Belgarde cases, extent of inherent powers of government which it proclaims, and its origin; (2) The validity of such a concept related to the Indian tribes under international law;

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[12] Kappler, Indian Affairs, Vol. I, 1044.

[13] Treaty of Point Elliott (1859) (Appendix to brief at 6a).

[14] Whoward, John, *United States v. Washington: A Last Stand for the Indians*? March, 1973, University of Washington Law Library: pages 4-8. Joseph, Alvin: The Indian Heritage of America, Alfred A. Knopf, 1968, pages 73-81.

(3) The relevant judicial decisions related to such concept; (4) The constitutionality of such a concept. In argument to QUESTION I, this is done under the following headings:

A. INDENTIFICATION OF CONCEPT OF INDEPENDENT TRIBAL SOVEREIGNTY

B. CONCEPT CONTRARY TO INTERNATIONAL LAW

C. CONCEPT CONTRARY TO JUDICIAL DECISIONS

1. INTRODUCTION
2. MARSHALL ERA: UNITED STATES V. TRIBES
   MARSHALL ERA: UNITED STATES V. STATES
3. EXPANSION ERA: UNITED STATES V. TRIBES
   EXPANSION ERA: UNITED STATES V. STATES
4. MODERN ERA: UNITED STATES V. TRIBES
   MODERN ERA: UNITED STATES V. STATES

D. CONCEPT CONTRARY TO UNITED STATES CONSTITUTION

The structure of the argument made follows and receives benefit from a review of tribal self-government made by Frederick J. Martone entitled: *AMERICAN INDIAN TRIBAL SELF-GOVERNMENT IN THE FEDERAL SYSTEM: INHERENT RIGHT OR CONGRESSIONAL LICENSES*, cited in the dissenting opinion of Justice Kennedy of the 9th Circuit in the *Oliphant* Case.[15]

It is asserted that a sense of *mea culpa* permeates public policy and some judicial decisions by taking out of context and remembering only the past subjugation of Indian tribes

[15] 51 *Notre Dame Lawyer* 600 (1976).

and bands and lands within the United States to the powers of the United States, without consideration of the benefits, rights, privileges and immunities received by all people within the United States under the Constitution, which otherwise could not have been. It is now argued that as to some non-Indians those rights, privileges and immunities while on an Indian reservation within the United States are being sacrificed by the application to them of the concept of independent Indian tribal sovereignty by the judicial decisions in the *Oliphant* and *Belgarde* cases.

A. Indentification of Concept of Independent Tribal Sovereignty

CONCEPT: The concept of independent Indian tribal sovereignty, upon which the decisions in *Oliphant* and *Belgarde* rest is: that a tribe, whose membership is limited to persons of common Indian ancestory, continues to have territorially all the domestic, independent, internal powers of government of a sovereign entity which the tribe of their ancestors had before the existence of the United States and after treaty with the United States – that are not otherwise expressly terminated by that treaty or acts of Congress (A-48, A-56, A-110). It assumes the tribe of their Indian ancestors existed originally as an independent sovereign state with internal, inherent powers of government over its own members, as well as non-members, territorially, within certain boundaries in which it asserted exclusively its rights to occupy, possess, and control. It then assumes that, regardless of discovery of their lands by European nations, war and conquest, the formation of the United States, a treaty with the United States and 200 years of United States history, that the *original independent sovereignty with inherent, internal powers of government over all persons and things continues*

within the area of the reservation created by the treaty. Such powers of government are therefore deemed to be original and not dependent upon any delegation of power from either the United States Constitution or the United States by way of treaty or acts of Congress – existing independently or concurrently with powers of the United States or of the State of Washington, and are unlimited territorially within the reservation – except as expressly denied by treaty or acts of Congress. APPLICATION TO OLIPHANT AND BELGARDE CASES: Application of the concept was made in the *Oliphant* and *Belgarde* decisions without proof or reference to any evidence that before the Treaty of Point Elliott was made in 1859, the Suquamish or any of the 22 tribes involved, was a sovereign entity exercising its governmental powers over its own peoples and other persons within a certain territory. The Respondents presented no evidence that after the treaty was made the Suquamish Indian Tribe existed on the Port Madison Indian Reservation as a sovereign entity and had exercised any internal domestic powers of government until passage by referendum vote of its members in 1973 of the Law and Order Code under which Oliphant and Belgarde were arrested.[16] Contrary evidence for the Petitioners is the fact that after the treaty was made the Suquamish Indian Tribe did not exist as a sovereign entity and did not exercise any powers of government over any of its own members or non-members of the tribe within the boundaries of the Port Madison Indian Reservation until 1973. (A-39, A-44).

When the Law and Order Code was promulgated as an act by the tribe of its original sovereignty to apply territorially within the reservation to its own members and non-members, no distinct community of its members lived on the reservation. Fifty to one hundred fifty members (adults and minors) lived on the reservation in scattered areas assimilated

[16] Law and Order Code, Suquamish Tribe (Appendix to brief 21a).

within a non-Indian population of approximately 2,928 residents. (A-44, A-47). Such evidence and lack of evidence was ignored in the decisions below, although it is material to the premises for the concepts of sovereignty and powers of government upon which the decisions were justified.

EXTENT OF POWERS UNDER CONCEPT: If one accepts the premise that a tribe is an independent sovereign entity or state with an origin of powers of its government not dependent upon either an origin or enumeration of those powers in its Constitution, a recognition of those powers in a treaty with the United States or a delegation of powers to it by acts of Congress of the Constitutional powers of the United States, it cannot then be argued that it does not have, necessarily, all unlimited internal powers of a sovereign state not of the union (not expressly limited by the treaty or acts of Congress) over persons and things within the territorial jurisdiction of the boundaries of the reservation as its membership may determine. Such powers may then exist concurrently with and not dependent upon whatever powers either the United States Government or the State of Washington may have over those same persons and things on a reservation.

Therefore it must be admitted an Indian tribe not only has the power to promulgate legislation, enforce the legislation by police action, and prosecute and adjudicate cases of criminal law territorially over all persons and things within the reservation for misdemeanors, but also for major crimes. A tribe therefore must have all those awesome civil and criminal internal powers of the United States Government constitutionally expressly enumerated and implied therefrom, exclusively or concurrently with that of states of the union, and those general powers of a State of the Union, limited or unlimited by the United States Constitution – otherwise not *expressly* limited by treaty or acts of Congress. Among such powers necessary to be included would be the power to raise

revenue by taxation and licensing of non-Indian persons and things on the reservation, zoning of lands,[17] regulation of business activity, and all other domestic powers of government (legislative, executive and judicial) though never exercised by the tribe before conquest and treaty with the United States, and not an exercise of powers by it in accordance with its own custom and usages for the protection of its own people. *The cart has been placed before the horse.* But the concept is false and unjustified.

FIRST FORMULIZATION OF CONCEPT: The first formulization of the concept was made in *Handbook of Federal Indian Law* first printed in 1940 or 1942 by the Department of Interior under the editorial supervision and direction of Felix S. Cohen.[18] In 1958 the Department of Interior published a book entitled: Federal Indian Law, acknowledging in the preface that it was a revision and updating of "Cohen's Handbook".[19]

The majority opinion of the Ninth Circuit in the *Oliphant* case affirmed the concept by citing *Worcester v. Georgia* and *Cherokee Nation v. Georgia*, stating:

> "Surely the power to preserve order on the reservation when necessary by punishing those who violate tribal law, *is a sine qua non of the sovereignty that the Suquamish originally possessed.* (A-) (Emphasis added).

[17] *Suquamish Tribal Community Ordinance* (Appendix to brief 47a).

[18] The *Handbook* has all but disappeared. It was republished without revision by the University of New Mexico, 1971, entitled: *Felix S. Cohen's Handbook of Federal Indian Law*, referred to as: "*Cohen's Handbook*".

[19] Federal Indian Law, Department of Interior, Oceana, 1958, referred to as: "*Federal Indian Law*". "*Cohen's Handbook*" in its Foreword refers to "Federal Indian Law" as a "vulgate version" * * * deteriorated into a volume with a new and constant theme: the Federal Government's power over Indian affairs is plenary."

Cohen's Handbook set forth the principle and concept in the following words:

> "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation."[20] (Section. Introduction p. 122) (Emphasis added).
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> "The whole course of judicial decision on the nature of tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

The major cases cited in support of the principle of inherent powers and the concept of independent tribal sovereignty in *Cohen's Handbook*[21] are *Worcester v. The State of Georgia*[22] and *Talton v. Mayes*,[23] both cases involving the

[20] *Cohen's Handbook*, 122.

[21] *Cohen's Handbook*, 122, 123, 124 and 125.

[22] *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515 (1832)

[23] *Talton v. Mayes*, 163 U.S. 376 (1896)

Cherokee Nation, and *Ex Parte Crow Dog.*[24] In conclusions on the subject of "The Derivation of Tribal Powers", Cohen's *Handbook* makes the following observation:

> "The extent, however, to which the foregoing principles may apply to scattered Indian groups which have never exercised powers of self-government presents questions to which no authorative answers have yet been given."[25]

Subsequent analysis of judicial decisions does not support the concept announced in Cohen's *Handbook.*[26] Comparison of the history of the people of the Cherokee Nation, the powers they asserted and the distinct lands they occupied finds no parallel with that of the Suquamish Indian Tribe.[27]

B. Concept Contrary to International Law

Though it may be admitted that some Indian tribes before conquest or treaty with the United States, and after treaty because of treaty language, preserved some elements of a domestic state or nation over their own internal domestic matters, it is contrary to the concept of a definition of a state that any Indian tribe is an independent sovereign state, not of the union, with internal powers of territorial jurisdiction over all persons and things of a domestic sovereign state within a reservation established by Congress, unless the treaty with the United States or subsequent acts of Congress expressly

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[24] *Ex Parte Crow Dog*, 109 U.S. 556 (1883)

[25] *Cohen's Handbook*, 126

[26] *Infra.* pages 35-72 hereof.

[27] Reid, *A Law of Blood, The Primitive Law of the Cherokee Nation*, N.Y. Univ. Press, 1970; Wardell, *A History of the Cherokee Nation*, Univ. of Okla. Press, Norman 1938.

granted such powers.[28] It is thus argued that the shoe must fit the horse, and not the horse the shoe, and it is the burden of the tribe to find in express language by treaty with the United States, acts of Congress or judicial decisions such territorial powers over all persons and things within a reservation.

The concept that an Indian tribe is a sovereignty–a legal entity of a state within a State of the Union and the United States retaining territorial jurisdiction with internal powers of a sovereign state over all persons and things within a reservation after conquest and treaty with the United States establishing a temporary area for their members' use and occupancy at the sufferance of the United States–does not accord with rules and principles of international law that were and are part of the law of the United States and appropriate for consideration.

Though the concept admits that tribes lack one of the three necessary elements of being a sovereign independent state: external powers, i.e. to engage in foreign relations (the name as States of the Union), it concludes that all other domestic internal powers of a state not of the union continue after conquest and treaty with the United States, without proof that before and after conquest or treaty with the United States the tribe existed as an entity, a state, with the other two necessary elements of the definition of a state in international law–*a defined territory and a population under the control of its government.* Pursuant to definition, these

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[28] *Restatement (Second) of Foreign Relations Law of The United States* §4 (1965) defines "state" as follows: " 'State' • • • means an entity that has *a defined territory and population under the control of a government and that engages in foreign relations.*"

two elements must exist before as well as after conquest and treaty with the United States.[29]

Language of the Treaty of Point Elliott of 1855 indicates that the Suquamish did not exist with such necessary elements before and after the treaty was made; proof of such existence after the treaty was made is absent in the record. The land established in the treaty for the area of the reservation was not formerly recognized in the treaty as being the land owned or occupied by a population of Suquamish Indians exercising powers of government over that area. The title to the territory of the reservation was ceded to the United States in the treaty; tribal lands of the Suquamish were not recognized as being for tribal use and occupancy as a state; tribal lands ceased to exist by terms for allotment provided in the treaty; allotment lands of individual members were sold and patents issued by the United States; a distinct community of Indians exercising powers of government, independent or dependent upon the United States, never existed on the Port Madison Indian Reservation after the treaty of 1855. Applying the principles of international law it is well to conclude that no such Indian tribe, having made a treaty with the United States in a language similar to the Point Elliott Treaty, has territorial jurisdiction within the boundaries of a reservation within a state of the union and

[29]Id. §94 defines the meaning of "Recognition" as follows: "(1) By an act of recognition, a state commits itself to treat an entity as a state or to treat a regime as the government of a state. §100 defines the "Minimum Requirements for Recognition of New State" by: "Before recognizing an entity as a new state, *the recognizing state is required to make a determination, reasonably based upon fact, that the entity* (a) *has a defined territory and population* (b) *is under the control of a regime that satisfies the minimum requirements for recognition as a government under §101;* (c) *has the capacity to engage in foreign relations;* and (d) *shows reasonable indications that the requirements of Clauses (a)-(c) will continue to be satisfied.*"(Emphasis added). Comment is made that this rule is a corollary of the definition of "state" in §4.

the United States over persons not members of the tribe and land and things not owned by the tribe, its members, or the United States.[30]

C. Concept Contrary to Judicial Decisions

1. Introduction

There are two dimensions to consider in the analysis and evaluation of whether judicial decisions support the concept of independent tribal sovereignty with inherent internal powers territorially over all persons and things within a reservation. One is the historical consideration of the particular treaty, the laws of Congress and the policy of the United States at the time judicial decision was made. The second dimension is to identify the relation of the interest of the parties involved to the dispute at hand.

The first dimension in this argument is historically divided into three periods: (1) *The Marshall Era* (Formation of the United States until December 29, 1935, Treaty With The

[30]Ibid: "§11. Territory Defined

The territory of a state consists of
(a) its land area;
(b) its internal waters and their beds;
(c) its territorial sea and the bed of the territorial sea; and
(d) the subsoil under, and (subject to the limitation indicated in §16) the air space above,(a),(b),and (c)";

"§17. Jurisdiction to prescribe with Respect to Conduct, Thing, Status, or Other Interest within Territory
A state has jurisdiction to prescribe a rule of law
(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and
(b) relating to a thing located, or a status or other interest localized, in its territory."

Cherokee Tribe, providing for emigration of the remaining Cherokees west of the Mississippi.)[31] (2) *The Expansion Era* (1835-1935: The end of Marshall Era to the Indian Reorganization Act of 1934).[32] (3) *The Modern Era* (1935 to the present time).

Within the Eras the second dimension requires division of disputes on reservations into three classifications:

(1) Disputes involving powers of Indian tribes over non-Indians (Tribes v. Non-Indians)

(2) United States powers over tribes or Indians (United States v. Indians)

(3) United States powers versus States powers over tribes, Indians and Non-Indians (United States v. States).

The second dimension of the 1st classification of judicial decisions can now be disposed of by stating there are no known decisions of where any Indian tribe exercised any kind of powers of government over a non-Indian that were not derived by either express language authorizing such powers in a treaty with that Indian tribe, a delegation of the powers of the United States by acts of Congress and/or authorization for the exercise of such powers by orders through the President of the United States.

The majority opinion of the 9th Circuit in the *Oliphant* case used one of such cases to support its reasoning of original sovereignty of an Indian tribe having inherent powers

[31] Dec. 18, 1935, *Treaty With The Cherokee Tribe*, 7 Stat. 478

[32] *Indian Reorganization Act of 1934*, ch. 216, 45 Stat. 1185, 25 U.S.C. §461 *et seq.* (1790) (Appendix to brief 16a).

to tax non-Indian residents by citing *Buster v. Wright*, 8 Cir., 1905. (A. 56, 57), disregarding the distinguishing facts.[33]

The Respondents in the return to the Petition for Writ of Habeas Corpus, although acknowledging that the case of *United States v. Mazurie*[34] involved a delegation of authority by Congress (Act of Aug. 15, 1953, 67 Stat. 586, 18 U.S.C. §116) of powers of the United States on the Wind River Reservation to the Wind River Tribes to adopt local option legislation for sale of retail liquor on the reservation, used that case as support for the criminal powers of the Suquamish over Belgarde omitting facts crucial to the opinion of the Court. (A. 100, 101, 102).

The Report and Recommendation of the United States Magistrate relied in the Belgarde case upon *Ortiz-Barraza v. United States* to support its recommendation of extending the Oliphant concept of independent sovereignty territorially within the Port Madison Reservation to state highways (A. 114, 115) by stating: ***"But the significant point is that the

[33] *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed 203 U.S. 599 (1906). The tax involved was a non-compulsory tax for the privilege of non-citizens of the Creek Nation doing business on *fee patent land* of the Creek Nation authorized by Congress (March 1, 1901) (chapter 676, 31 Stat. 861, 866 §§ 10-16). The Creek Nation was guaranteed full jurisdiction of its government by such act and by treaty of 1832 (7 Stat. 368, art. 14), of Aug. 7, 1856 (11 Stat. 703, art. 15), and of June 14, 1866 (14 Stat. 788, art. 10). 135 F. 949,950,952,953.

[34] *United States v. Mazurie*, 419 U.S. 544 (1975) The Mazuries were convicted of a violation of United States Law in federal court, not a tribal court.. 18 U.S.C. §1154 Federal officers enforced the law. This Court clearly distinguished from the concept of independent tribal sovereignty by stating: "*We need not decide whether this independent authority is itself sufficient for tribes to impose Ordinance 26.* It is necessary only to state that the independent authority is quite sufficient to protect Congress's decision to vest in tribal councils this portion of its own authority to regulate Commerce *** with the Indian tribes". (Emphasis added).

court held [*Ortiz-Barraza v. United States*] the territorial jurisdiction of the tribe and of its police, was the same on a state highway as on the balance of the reservation."[35]

This then leaves for consideration the judicial decisions in the Marshall, Expansion, and Modern Eras to the two classes of cases related to United States v. Indians and United States v. States. Before commencing it is difficult to reason that the concept of independent tribal sovereignty with inherent internal powers can be said not to be dependent upon delegation of powers of treaty, acts of Congress, or authorization by orders of the President of the United States, the executive and judicial branch of the Federal Government, but yet said to exist because of decisions of the judicial branch. But that is not so; the very existence of the concept is dependent for its origin and its continuance upon the decisions of this Court when interpreting the Constitution of the United States, treaties with tribes, acts of Congress and executive orders to determine both the validity of the existence of such sovereignty, the extent of its powers, and the constitutional means by which powers are to be exercised.

The decisions of this Court do not support the concept. Before analysis of the two classes of cases in the eras stated, it is obvious to note, although the Respondents may otherwise argue, that the establishment, extent and continuance of the exercise of the powers of the Federal Government

[35] *Ortiz-Barraza v. United States*, 512 F. 2d 1176 (9th Cir., 1975). Significantly the Magistrate recognized that the case involved a prosecution under federal law and not tribal law, but failed to note that the opinion declared the arrest by an Indian police officer of a non-Indian distinguished the power of the tribe over a non-Indian by stating: "It has at times been held that tribes may not exercise criminal jurisdiction over non-Indians. *Ex Parte Kenyon*, 14 Fed. Cas No. 7720 (1887). Such holdings, if presently valid have not deregated from the sovereign power of tribal authorities to exclude trespassers who have violated state or federal law by delivering the offenders to the appropriate authorities".

in either relation to Indian tribes and Indians, or to States of the Union territorially within a reservation in judicial decisions *do not* define, establish, or extend the powers of a tribe as an independent sovereignty with inherent powers territorially over all persons and things on a reservation. This is particularly so in relation to non-Indians.

C. Concept Contrary to Judicial Decisions

2. Marshall Era: United States v. Tribes

In the era of Chief Justice Marshall two cases were decided in chronological order, the first deciding the nature of ownership of tribes to lands in the United States outside of a State of the Union declaring a principal humanitarianism that the tribes were to be protected *Johnson v. M'Intosh* (1832).[36] M'Intosh had received title from the United States and Johnson had received title by heirship from predecessors who had received title from tribes. After determining that it was an established principle among European nations that discovery gave title to the lands inhabited by Indians to the European government by whose subjects, or by whose authority, discovery was made, the only opinion, written by Chief Justice Marshall, went on to say:

> "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; *but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to*

[36] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it". (Emphasis added)[37]

The Court decided that as a result of the revolutionary war and treaty with Great Britian the *discovery rights and powers of government* of Great Britian over the lands inhabited by the Indians *became that of the United States,* that conquest of Indian lands was maintained by force as far West as the Mississippi and then in dicta declared the alternative choices: assimilation of Indians by the conqueror or separation and governed by the conqueror, as follows:

> "*When the conquest is complete, and the conquered inhabitants can be blended with conquerors, or safely governed as a distinct people,* public opinion, which not even *the conqueror* can disregard, imposes these restraints upon him; and he *cannot neglect them without injury to his fame, and hazard to his power******[38]
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> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained, if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. *So, too, with respect that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in possession of their lands, but to be deemed incapable* of transferring the absolute title to others." (Emphasis added).[39]

In *Cherokee Nation v. The State of Georgia* (1831),[40] direct issue was presented of the concept of independent

[37]Ibid. 574

[38]Ibid. 589,590

[39]Ibid. 591

[40]*Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1 (1831)

sovereignty of The Cherokee Nation as being a jurisdictional party-plaintiff as a "foreign state" for the Supreme Court to have original jurisdiction in an action to enjoin the State of Georgia under article three, second section of the Constitution enumerating and extending the Court's jurisdiction to "controversies between a state or the citizens thereof, and *foreign states,* citizens or subjects." (Emphasis added).

In familiar arguments *the Cherokee nation argued that it was a sovereign and independent state before the United States,* that they have been and are the sole and exclusive masters of their territory, with rights of self-government in accordance with their own laws, usages, and customs, and they are not subject to the principle of discovery and conquest to which they did not assent as an aggregate of aliens to the United States and a "foreign state". They interpreted the treaties with the United States as a recognition and guarantee of such status to territorial occupancy of their lands and independent sovereignty as a "foreign nation", rather than a grant of a right of occupancy of territorial lands from the United States, or a continuance of sovereign status dependent upon such treaties and acts of Congress.[41]

The majority opinion written by Chief Justice Marshall concluded that the Cherokee nation was not a "foreign state" and therefore was not a proper party-plaintiff to give the United States Supreme Court original jurisdiction.

The majority opinion recognized that because of the past history of the tribe, numerous treaties with the United States and laws of the United States enacted in the spirit of those treaties that the Cherokee nation had the status of a sovereign state not of the union.[42]

[41]Ibid. 3,4,5,6

[42]Ibid. 16

Then after stating that Indian territory is within the United States; that an attempt of a tribe of commerce or intercourse with foreign nations is considered under the jurisdiction of the United States; that the United States has sole and exclusive right of regulating their trade and commerce and managing their affairs; that their land in treaties were ceded to the United States and they had only a limited right to occupy certain lands; that in the treaty they acknowledged their dependence, the majority opinion concluded:

> "****They may, more correctly, perhaps, be dominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian****
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> They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility." (Emphasis added).[43]

Justice Johnson in a separate opinion concluded that they did not have the sovereign status of a state: "They never have been recognized as holding sovereignty over the territory they occupy".[44] After examining history and concluding that before treaty their society was never connected by a "semblance of organic government"[45] that they are not recognized by any foreign states as a state; that there is no proof that they had been recognized in treaties as a state, but

[43]Ibid. 17, 18

[44]Ibid. 22

[45]Ibid. 22

rather they had renounced in treaties almost every attribute of sovereignty; *that subsequent to the treaties they organized themselves into organized government,* (compare with actions of Suquamish Indian Tribe) but "others" have the right to be consulted on admission of new states, he stated:

> "However, I will enlarge no more upon this point; because I believe, in one view and in one only, *if at all, they are or may be deemed a state, not a sovereign state,* at least while they occupy a country within our limits. *Their condition is something like that of the Israelites, when inhabiting the deserts.* Though without land that they can call theirs in the sense of property, *their right of personal self-government has never been taken from them;* and such a form of government may exist though the land occupied be in fact that of another." (Emphasis added).[46]

Justice Baldwin in the Cherokee case, after a lengthy examination of the historical trace of Indian affairs; cession of Indian lands by states to the United States for future creation of new states of the union; creation of the northwestern territory and subsequent treaty concluded:

> "****that Indian affairs formed no part of the foreign concerns of the government, and *that though they were permitted to regulate their internal affairs in their own way, it was not by any inherent right acknowledged by congress or reserved by treaty, but because Congress did not think proper to exercise to sole and exclusive right, declared and asserted in all their regulations* from 1775 to 1788, in the articles of confederation, in the ordinance of 1787, and the proclamation of 1788; which the plaintiffs solemnly recognized and expressly granted by the treaty of Hopewell in 1785, as conferred on Congress to be exercised as they should think proper." (Emphasis added)[47]

[46]Ibid. 27

[47]Ibid. 40

Then, *after examination of the Constitution* with the above-quoted conclusion as a background, *Justice Baldwin then turned to the subsequent assumptions of powers by the Cherokees after the Constitution of the United States* and wrote:

> "*****judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have acted for fifty-five years; and force, by mere judicial power, upon the other departments of this government and the states of the union, the recognition of the existence of nations and states within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions.* It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and Union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown, unacknowledged by any department of government; denied by all through all time; unclaimed till now; *and now declared to have been called into exercise, not by any change in our constitution, the laws of the union or the states; but pre-existent and paramount over the supreme law of the land.*" (Compare with acts of Suquamish Indian Tribe) (Emphasis added).[48]

Justice Thompson in the Cherokee case, dissenting and concluding that the Cherokee Nation was a "foreign nation", sovereign and independent, distinguished it from tribes, such as tribes like the Suquamish, in stating:

> "*This remark* [conclusion of independent sovereignty of Cherokee nation] *is to be understood, of course, as referring only to such as live together as a distinct*

[48]Ibid. 49, 50

> *community, under their own laws, usages and customs;* and not to the mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country; their national character extinguished; and their usages and customs in a great measure abandoned; self-government surrendered; and who have voluntarily, or by the force of circumstances which surrounded them, gradually become subject to the laws of the states within which they are situated." (Compare with Suquamish Indian Tribe) (Emphasis added).[49]

In substantiation of finding independent sovereignty, excluding the jurisdiction of the state of Georgia, Justice Thompson noted the treaty of Hopewell provided that should any Indian *or other person* commit a capital crime *against a citizen of the U.S.* the tribe agreed to surrender the offender to U.S. authorities for prosecution. Also it was noted that crimes by citizens of the United States against Indians or Indian property were to be punished by the laws of the state and were to be proceeded against the same as if the offense had taken place in the state in which the Indian country was located. *Treaty of Holston*, July 2, 1791, 1 Laws U.S. 327.[50] Thus Justice Thompson in dissent traced independent sovereignty to treaties to exclude the powers of the state.

C. Concept Contrary to Judicial Decisions

2. Marshall Era: United States v. States

The unique relationship of the domination of the United States over Indian tribes and their people for their protection and welfare in continuance of the humanitarian policy after discovery, conquest and wars announced by

[49]Ibid. 59, 60

[50]Ibid. 60,61,62

Chief Justice Marshall in *Cherokee v. State of Georgia*[51] was continued for their protection in *Worcester v. State of Georgia* (1832)[52] and became the cornerstone thereafter to the present date for the concept of Indian tribal sovereignty being used to establish the plenary exclusive powers of the United States Government for the protection of Indians and Indian tribes from the power of the states.

In *Worcester v. The State of Georgia*, the concept of independent tribal sovereignty was not at issue. The issue was the constitutionality of legislation by the State of Georgia within the reservation to directly terminate the rights of occupancy of the Cherokee nation and their people to occupy certain lands within the State of Georgia granted in treaties with the United States; to control their commerce with non-Indians entering and residing on the reservation; to terminate their government and to control the entrance and activity of any outsider on their land without license – including Worcester, a missionary from the state of Massachusetts, from entering their lands to preach the gospel by authority of the President of the United States.

Worcester v. The State of Georgia is therefore not support for the tribal sovereignty concept, but when coupled with *Cherokee v. The State of Georgia*, indicates that this concept had been rejected and, thus, authority as to any existence of sovereignty of a tribe was dependent upon:

1. The constitutional enumerated power of the United States exercised by treaty with an Indian tribe;
2. The constitutional enumerated power of the United States exercised by acts of Congress under the Commerce Clause;
3. Title to the land or territory being within the jurisdiction of the United States Government;

[51] Supra.

[52] *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515 (1832)

4. Policy of humanitarianism in the expression of the guardian-wardship doctrine of Chief Justice Marshall in the Cherokee case dependent upon a distinct community occupying certain lands within the United States subject to a government for the protection of their people.

The acts of the legislature of the State of Georgia were thus examined and Chief Justice Marshall, material to this case, remarked:

> "****The *Extra-territorial power* of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction." (Compare with Suquamish Indian Tribe) (Emphasis added).[53]

* * * * *

Further quotations from the opinion of Chief Justice Marshall support the above conclusions:

> "****The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected."[54]

* * * * *

> "****That instrument [Constitution of the United States] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.[55]

[53] Ibid. 541,542

[54] Ibid. 552

[55] Ibid. 558

* * * * *

"******The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, if, by our Constitution and laws, vested in the government of the United States*". (Emphasis added).[56]

* * * * *

"*****If the review which has been taken to be correct, and we think it is, *the acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.*" (Emphasis added).[57]

Justice M'Lean in *Worcester v. State of Georgia*, concurring in the opinion prophetically stated:

"*****But the inquiry may be made, is there no end to the exercise of this power over Indians within the limits of a state, by the general government? The answer is, that, in its nature, it must be limited by circumstances.

If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them****

The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government, in the extinguishment of their title, and especially by the compact with the state of Georgia. *But, a sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or eventually consent to become amalgamated in our political communities.*

[56]Ibid. 560

[57]Ibid. 561

At best they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; *and their existence within a state, a separate and independent community, may seriously embarrass or obstruct the operation of state laws.* If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority." (Emphasis added).[58]

C. Concept Contrary to Judicial Decisions

3. Expansion Era: United States v. Tribes

Subsequent judicial decisions in the age of expansion did not diminish the constitutional territorial powers of the United States Government in "Indian Country" in relationship to that of powers of the tribe. During the expansion period territories of the United States were established subject to the laws of the United States in Indian Country. Some Indian tribes' rights of occupation to lands within states were terminated by relocation of the tribes.[59] States were created

[58]Ibid. 592,593

[59]Wardell, *A Political History of the Cherokee Nation*, Univ. of Okla. Press, Norman 1938, p. 348: The last election of the chief of a powerful tribe of Indians was in many respects the climax of a series of tragedies. For nearly three-quarters of a century this Nation had suffered divisions, wars, and desolation:** Now the mockery of a one-time glorious event was about to be enacted – an executive must be chosen to close the business of a fallen republic**** The passing of an Indian state was but another step in the direction of a larger Union of American commonwealths.

from territories of the United States. The civil war between the states took place; rights of homestead were granted on public lands in Indian Country; migration and settlement of non-Indians in Indian Country took place in territories west of the Mississippi resulting in Indian wars, peace treaties, and confinement of tribes to reservations under a policy of "Manifest Destiny." Tribal lands were extinguished by allotment in severalty to individual Indians and surplus sales to non-Indians on reservations under a policy of termination of tribal status and assimilation of Indians into the society of American citizens took place by treaties and the General Allotment Act of 1887.[60] Finally within all continental boundaries of the United States there was established 48 states with general sovereignty of states of the Union under the United States Constitution. All during that period of time, the only Supreme Court judicial decisions involved the criminal jurisdiction of the right of power of an Indian tribe as a matter of self-government to legislate, prosecute, adjudicate and punish a defendant according to their laws for an offense taking place in Indian Country. That right was sustained where offenses involved an Indian against an Indian, or members of the same tribe, or occurred on trust lands of the United States. More important, the decisions rested upon the Court's determination of whether such power existed as a matter of interpretation of treaties and acts of Congress and not as a matter of independent self-government.

Talton v. Mayes (1896) is one of those cases first cited by Cohen's *Handbook* to be in support of the principles and concept that he formulated.[61] The defendant, a Cherokee

[60]Martone, *American Indian Tribal Self-Government In The Federal System; Inherent Right of Congressional License*? 51 Notre Dame Lawyer 600, 605, 606, 607; D. Otis, The Dawes Act and The Allotment of Indian Lands (1973).

[61]*Cohen's Handbook*, 123 *Talton v. Mayes*, 163 U.S. 376 (1896)

Indian, was charged, prosecuted, and sentenced to death pursuant to legislation, enforcement, trial and punishment of the Cherokee Nation. The treaty of 1835, 7 Stat. 478, with the Cherokee Tribe specifically provided that the land of the Cherokees would not be included within the limits of the jurisdiction of a territory or state and that they could make such laws as they deemed necessary for the protection of their people excluding, however, citizens of the United States that travel or reside in Indian Country by permission of the United States.

The defendant claimed the rights of the 5th Amendment of the United States Constitution in that he had not been tried by a fair and impartial jury. Before the Court was the issue of whether the powers of the tribe came from the Constitution as local powers of the Federal Government. The Court ruled that they were independent powers of self-government not arising under the Constitution of the United States or from powers of the Federal Government and the 5th Amendment did not afford the Indian defendant protection.[62]

Suffice it to say that Justice White who wrote the opinion used *Worcester v. The State of Georgia* as a sword against the claim of rights of an Indian defendant to the 5th Amendment instead of a shield against state powers with the inference that the powers of self-government were not dependent upon the treaty powers of the tribe.[63]

The Court concluded where the power of the Cherokee Nation came from by stating:

> "*By treaties and statutes of the United States the right of the Cherokee nation to exist as an autonomous body,*

[62]Ibid. 382

[63]Ibid. 383. The Court quoted *Cherokee Nation v. The State of Georgia*, where the majority agreed the Cherokee Nation was a state (See Footnote____) and *Worcester v. The State of Georgia* (See Footnote ____) supra.

subject always to the paramount authority of the United States, *has been recognized.* And *from this fact* there *has consequently been conceded to exist in that nation power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members within the territory of the nation.*" (Emphasis added.)[64]

Before the close of the 19th century there remained two companion cases to consider as to the concept of Indian tribal powers on a reservation in relationship to the powers of the United States. The first is *Ex Parte Crow Dog* (1883),[65] and the second, *United States v. Kagama* (1886).[66] Each case involved the murder by one Indian of another Indian of the same tribe, the first case members of the Sioux tribe in Territory of Dakota, and the second members of Hoopa Valley Reservation in the State of California. As a result of the decision in *Ex Parte Crow Dog* which determined the exemption provided by the Trade and Intercourse Act of the application of the laws of the United States to crimes between Indians in Indian Country,[67] the Major Crimes Act was passed which then came to test in the *Kagama* case.[68]

The Indian defendant in *Ex Parte Crow Dog*[69] relied on the exemption stated in the statute. The federal prosecutor, to uphold the conviction of the federal court, became involved in a "Catch-22" argument by arguing that the exemption did

[64] *Talton v. Mayes*, 163 U.S. 376 (1896), 379, 380

[65] *Ex Parte Crow Dog*, 109 U.S. 556 (1883), cited in *Cohen's Handbook* for support of the concept at page 124.

[66] *United States v. Kagama*, 118 U.S. 375 (1886)

[67] *Trade and Intercourse Act*, 18 USC §1152, (Appendix to brief, 14a, 15a).

[68] *Major Crimes Act*, 18 USC §1153, (Appendix to brief, 15a).

[69] *Ex Parte Crow Dog*, 109 U.S. 556(1883) 568, 569.

not apply because of treaty language that provided: "bad men among the Indians" were to be delivered to the United States to be tried and punished by United States laws and that the United States pledged to the tribe an "orderly government". Like the *Treaty of Point Elliott* (1859) the *Sioux Treaty* of April 29, 1968, (15 Stat. 635) was devoid of any powers of government to be exercised by the tribe.

In *Ex Parte Crow Dog* the "Catch-22" argument was not successful. The case can hardly be used as a support for the concept of independent tribal sovereignty when the Court determined that the pledge of an "orderly government" inferred that the tribe had no self-government when the treaty was made and the treaty merely provided that subject to an act of Congress they were to receive an "orderly government". The nature of the "orderly government" to be received denying the concept of independent tribal sovereignty was stated by the Court to be:

"***appropriate legislation thereafter to be framed and enacted, necessarily implies, ***that among the arts of civilized life,***which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of *self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by an administration of their own laws and customs*******subject to the laws of the United States***as wards subject to a guardian*** advancing from the condition of a savage tribe to that of a people who***it was hoped might become a self-supporting and self-governed society***" (Excerpts made and Emphasis added).

The hiatus in the law whereby major crimes by one Indian offender against an Indian victim was closed by the Major Crimes Act and the issue of its constitutionality came to the front in the *Kagama* case.[70]

[70] *United States v. Kagama*, 118 U.S. 375 (1886).

Two constitutional issues were formed:

(1) The constitutional origin of power for Congress to enact legislation in a territory of the United States, or on a reservation within a state of the union relating to an offense by one Indian against another in either of those two areas; (2) What constitutional justification was there for the exercise of those powers on a reservation within a state?

In essence the Supreme Court solved the issues by indirectly in effect serving a death warrant on the concept of the existence of independent Indian Tribal Sovereignty. The Court recognized that Congress in 1871 had enacted legislation providing:

> "No Indian nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, with whom the United States may contract by treaty. 25 USC §17.[71]

With reference to that act the Court stated:

> "In the opinions [*Cherokee Nation v. Georgia; Worcester v. State of Georgia*] in these cases they are spoken of as "wards of the nation", "pupils" as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. *But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure – to govern them by acts of Congress. This is seen in the act of March 3, 1871****" (Emphasis added).[72]

The Court could find no help in the doctrine of dependent nation in the *"treaty-making system of government"*, or in the commerce clause to justify constitutionally the authority of Congress to pass the Major Crimes Act. It went on further to exclude any inference to be made that even in relations

[71] Ibid. 382 (Appendix to brief 14a).

[72] Ibid. 382

between Indians, not involving non-Indians, the concept of independent Indian tribal sovereignty *can* exist when the Court stated:

> *"But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these****" (Emphasis added).[73]

The Supreme Court in *Kagama* then used the constitutional thesis of but two sovereignties to establish that Congress within a territory or a reservation had constitutional authority independent of the commerce clause and treaty-making powers to pass such legislation because of the "ownership of the country in which the Territories are****"[74]

Again using the thesis to justify more narrowly the reason that was used by Chief Justice Marshall in *Worcester v. The State of Georgia* to establish the constitutional right of the United States Government to totally exclude and pre-empt the laws of a state in Indian Country within a state (treaty making and self-government of a distinct community of the Cherokee nation), the Court opened the door for states powers on reservations by more narrowly defining the reason for state exclusion by stating:

> "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among who they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States,

[73] Ibid. 379

[74] Ibid. 380

because it has never been denied, and because it alone can enforce its laws on all the tribes." (Emphasis added).[75]

C. Concept Contrary to Judicial Decisions

3. Expansion Era: United States v. States

State powers on a reservation soon intruded. The exclusiveness of United States powers to prevent intrusion because of the concept that a reservation (Indian Country 18 USC 1151) prevents extra-territorial jurisdiction of a state (as was the backbone of the decision in *Worcester v. State of Georgia*)[76] ended with the application of state law and the jurisdiction of state courts in a crime of murder occurring on the Crow Indian Reservation in Montana where the offender and the victim were both non-Indians–*Draper v. United States*, (1896).[77]

There a *non-Indian* defendant had been tried, convicted and sentenced to death *in federal court for murder of a non-Indian* presumably as a violation of the general laws of the United States under the Trade and Intercourse Act (18 USC 1152), and the Assimilative Crimes Act (18 USC §13), on the basis that an Indian reservation as such excludes the powers of the state over the same act. The Court examined the *Crow Indian Treaty* of 1868, 15 Stat. 649, and could find no exclusion in treaty language in creating the Crow Reservation in its treaty with the United States restricting the reservation as not being within the Territory of Montana when it was created. May 26, 1864, C. 95, (13 Stat. 85)

[75] Ibid. 384, 385.

[76] See footnote 53 hereof.

[77] *Draper v. United States*, 164 U.S. 241 (1896)

The Court then formulated the issue and asked:

> "****Has the State of Montana jurisdiction over offenses committed within its geographical boundaries by persons not Indians or against Indians, or did the enabling act deprive the courts of the State of such jurisdiction of all offenses committed on the Crow Indian Reservation, thereby divesting the State pro tanto of equal authority and jurisdiction over its citizens, usually enjoyed by the other States of the Union?" (It is significant to note that the Court did not limit its question to jurisdiction of the state to crimes by non-Indians against Indians).[78]

The Constitution of the State of Montana through the enabling act of Congress (February 22, 1889, 25 Stat. 675, c. 180) contained the same restrictive language of powers of that state that are set forth in the Constitution of the State of Washington in Article XXVI, to wit:

> "Second. That the people inhabiting the said proposed State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States****"[79]

The Court decided that the above words in the Constitution of Montana providing: "And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States", did not mean "exclusive jurisdiction", by showing that through acts of Congress subsequent to agreements with the Crow Indians, sale of tribal

[78] Ibid. 242

[79] Art. XXVI, Constitution of Washington, (Appendix to brief 3a-4a).

lands took place and allotments to Indians took place in severalty which became the pattern in subsequent legislation by Congress under the General Allotment Act. Upon completion of the severalty allotments to Indians and the issuing of patents, the General Allotment Act provided that the members of the tribes would then be subject to both the civil and criminal laws of the State or Territory where the allotment and patenting took place. April 11, 1882, c. 74, 22 Stat. 42; General Allotment Act: February 8, 1887, c. 119, 24 Stat. 388.

The Court then determined that the reservation of jurisdiction of the United States contained in the Constitution of Montana: "all lands lying within said limits owned or held by any Indian or Indian tribes, and until title thereto shall have been extinguished by the United States****" was relevant to preventing jurisdiction being taken by the State of Montana when title of the United States had become extinguished by allotment in severalty and *but* for such reservation of jurisdiction Indians would have become under the jurisdiction of the state.

In *Draper v. United States* (1896) the Court concluded:

> "****It *follows* that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted into the Union adequately explains the use of the words relied upon and demonstrates that in reserving to the United States jurisdiction and control over Indian lands *it was not intended to deprive that State of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians,* and that a consideration of the whole subject fully answers the argument that the language used in the enabling act becomes meaningless *unless it be construed as depriving the State of authority to it belonging in virtue of its existence as an equal member of the Union*****" (Emphasis added).[80]

[80] Ibid. 247

With such conclusion the concept of independent tribal sovereignty of the Suquamish Indian Tribe is meaningless in its claim of having powers of government over non-Indians and their lands and things within the Port Madison Indian Reservation in the event that the United States no longer has jurisdiction. The same reasoning in *Draper v. United States* is applicable as to the powers of the State of Washington on the Port Madison Indian Reservation. The jurisdiction of the United States has ended on the Port Madison Indian Reservation as to crimes between non-Indians on the reservation, and the general powers of the state of Washington over its own citizens, which are not subject to the limited enumerated constitutional powers of the United States Government, have come to be exercised.[81]

C. Concept Contrary to Judicial Decisions

4. Modern Era: United States v. Tribes

In 1934 the period of assimilation of Indian lands, Indian people and Indian government on Indian reservations abruptly ended with the passage by Congress of the Indian Reorganization Act of 1934.[82] In 1953 assimilation continued again, only more forcefully, by passage by Congress of Public Law 280 providing for full criminal and civil jurisdiction of

[81] See Brief of Kitsap County, *amicus*, as to the jurisdictional history of the area in question.

[82] *Indian Reorganization Act* (1934) 48 Stat. 984 (Appendix to Brief 16a: 25 USC §476; 16a-17a: 25 USC §477).

state laws within Indian reservations.[83] In 1968 there was again a partial reversal of the 1953 legislation by passage of the Indian Civil Rights Act. In this modern era there is a new challenge being asserted by Indian Tribes with new resources asserting the authority of the tribe in the context of original sovereignty not dependent upon treaties or acts of Congress to have territorial jurisdiction of their governments over all persons, lands, and things within a reservation although the status of those persons, lands and things were and had become non-Indian subject to the laws of the state where the reservation was located during the previous period of assimilation.[84]

Now that tribes with "self-determination" are supplied with new funds and resources from the federal government through contracts with the United States in an *amount dependent upon a head count of persons and things under their jurisdiction,* it becomes more important in order to avoid conflicts of law and jurisdiction between the United States and tribes, States and tribes, and States and the United States;

[83]67 Stat. 588 (1953), Public Law 83-280; H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1958): "It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and perogatives pertaining to American citizenship; *** "

[84]Martone, 51 Notre Dame Lawyer 600 (1976). "The United States is in the midst of a new civil war. *** Though the war began when the first white men settled on the North American continent, and has continued unabated to the present, the struggle has reached a new state in which the Indian tribe rather than the settler is on the offensive *** " Resources and funds of the United States are supplied tribes via: Indian Self-Determination Act, Pub. L. 93-638, §2, Jan. 4, 1975, 88 Stat. 2203, 25 USCA §450, et seq.

duplication in services, and waste of manpower and resources, to decide the issue of the source of powers of government of a tribe when not set forth in a treaty: original sovereignty or that dependent upon the constitutional powers of the United States Government through acts of Congress.[85]

The decisions of *Cherokee Nation v. The State of Georgia* (1831), *Talton v. Mayes* (1896), *Oliphant v. Schlie* (1976), and *United States v. Wheeler* (1976), are in conflict on that issue.[86] *Cherokee Nation v. The State of Georgia* and *Talton v. Mayes* may be excluded insofar as the language of the treaties with the Cherokee nation explicitly recognized the Cherokee nation at the time of those judicial decisions as having powers of self-government, but included insofar as being termed "dependent nation", or "dependent communities".

The decision of *United States v. Wheeler* (1976), supra, is in irreconcilable conflict with the decisions of *Talton v. Mayes* (1896), supra and the decision in the *Oliphant* case. There a Navajo Indian had been charged, prosecuted and convicted on a plea of guilty of the crime of contributing to the delinquency of a minor by the Navajo Tribal Court, presumably for an offense of its law occurring on the Navajo Reservation. The victim was a female Indian minor. Later, the federal government as one of the offenses of the Major Crimes Act, (18 USC sections 1153, 2032, (1970)) charged the same defendant for the same actions against the victim that constituted the Indian crime of contributing to the delinquency of a minor, carnal knowledge of a minor, in federal court, as a crime of the United States. The Indian

[85]Ibid: 25 USC Sec. 450 f. et seq, Also: A.9,13,91; Oliphant R.65, Exhibit 1.

[86]*Cherokee v. The State of Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Talton v. Mayes*, 163 U.S. 376, (1896); *Oliphant v. Schlie*, 544 F.2d 1007 (1976) A-___; *United States v. Wheeler*, 545 F.2d 1255 (1976).

defendant claimed the defense of double jeopardy under the 5th amendment of the United States Constitution, arguing that the violation of the law of the Indian tribe and the violation of the law of the United States arising out of the same action was a crime against one sovereign.

While the case might not be relevant to this case so far as the Petitioners herein are non-Indians, it is relevant that the court in *United States v. Wheeler* denied the concept of separate sovereignty of the Navajo tribe from that of the United States–even as to crimes by Indians against Indians in Indian Country. In effect, the result of the decision is that an Indian Tribal Court limited to punishment of a $500.00 fine and/or six months in jail upon the trial and punishment of criminal defendants for major crimes committed against the laws of the United States. By this analysis, an Indian could murder a non-Indian, or a non-Indian murder an Indian on the Port Madison Indian Reservation in the State of Washington and be tried for assault in Tribal Court, fined $500.00 and sentenced to six months in jail and escape a much harsher punishment by the Federal Court of the United States for violation of a major crime of the United States.

In comparing the conclusions made in the majority opinion of Chief Justice Marshall in *Cherokee Nation v. The State of Georgia*, it was stated:

> "Is the Cherokee nation a foreign state in the sense in which that term is used in the Constitution?*****So much of the argument as was intended to prove the character of the Cherokee nation as a state*, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, *has, in the opinion of the majority of the Judges, been completely successful*****" (Emphasis added).[87]

Whereas the majority opinion in *United States v. Wheeler* (1976) writes:

[87] *Cherokee v. The State of Georgia*, 30 U.S. 16 (1831)

> "In the instant case, we are faced by a dual trial situation that does not fit neatly into either the "single sovereign" or "dual sovereign" categories. Indian tribal courts are not merely a political unit of the Federal Government, such as federal district courts, military tribunals, etc. Indian tribes do maintain a "semi-independent position" within the borders of the United States**** *But, at the same time, they clearly do not have the sovereign status of a state******The federal government has complete, plenary control over the criminal jurisdiction of tribal courts******It possesses no such control with respect to the states*". (Emphasis added).[88]

United States v. Wheeler (1976) is inconsistent with *Talton v. Mayes* (1896) in that in each a criminal Indian defendant argued the 5th amendment: Mayes upon a conviction of murder under Indian law by an Indian court, and Wheeler under an indictment for violation of a major crime of federal law by a federal court. Mayes was punished; Wheeler was released. Mayes argues that the 5th amendment was applicable to tribal court proceedings, but the Court held that the Cherokee nation's right to self-government arose prior to the Constitution and therefore the 5th amendment was not applicable. The Court further held it was not a case of local powers delegated to the tribe of the powers of the federal government to which the 5th amendment would apply.[89]

The *Oliphant* majority decision of the 9th Circuit is consistent with the *Mayes* case in theory of original sovereignty, and yet inconsistent in that the Cherokee Treaty provided for jurisdiction over Mayes as an Indian, and the Point Elliott Treaty (1859) is silent as to tribal powers over Indians or non-Indians. The Petitioner's argument is consistent with the decision in the *Wheeler* case, but the decisions in the two cases are inconsistent–*Oliphant* is concerned with original

[88] *United States v. Wheeler*, 545 F.2d, 1255, 1257

[89] *Talton v. Mayes*, 163 U.S. 376 (1896), 384, 385

sovereignty; *Wheeler*, relates to local government of United States Government or the one sovereignty concept. Thus it can be said a non-Indian before a tribal court exercising powers of local government arising from powers of the United States (*Wheeler*), is denied the protection of the United States Constitution. In effect there is constitutional protection from actions of the principal (United States) but not against actions of the agent (tribes) in carrying out the actions of the principal–perhaps on the theory that the agent is not an agent, he is an independent contractor.

C. Concept Contrary to Judicial Decisions

4. Modern Era: United States v. States

In *Williams v. Lee* (1958),[90] a non-Indian, licensed by federal statute to operate a general store on the Navajo Indian Reservation endeavored to collect a debt incurred in the store on the reservation from a member of the tribe. Williams had attacked the jurisdiction of state court over his person, his sheep and his debt all located on the reservation. The Arizona Supreme Court had upheld state court jurisdiction in an opinion that ignored the existence and possible jurisdictional claim of the tribal court. The Supreme Court in overruling the state supreme court's decision in the opinion of Justice Black stated:

> "****The broad principles of that decision [*Worcester v. Georgia*, 6 Pet. 515] came to be accepted as law. Over the years *this Court has modified these principles in cases where essential tribal relations were not involved*****" (Emphasis added).[91]

* * * * *

[90] *Williams v. Lee*, 358 U.S. 217 (1958)

[91] Ibid. 219

> "*Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians* to make their own laws and be ruled by them." (Emphasis added).[92]

After reviewing acts of Congress the Court concluded:

> "No Federal Act has given state courts jurisdiction over such controversies."
>
> "****There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence *would infringe on the right of the Indians to govern themselves.*" (Emphasis added).[93]

In *Kake v. Egan*, (1962)[94] the Court affirmed the denial of injunctive relief by two communities, Kake and Angoon from preventing the State of Alaska from enforcing its conservation laws where Indian traps were seized and the Indian President of the Indian Council and crews of the village were arrested by state authorities. The operation of the traps by the communities was authorized by federal laws and regulations. The opinion written by Justice Frankfurter made the following conclusions:

> "The general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia* (US) 6 Pet 515, 561, 8 L ed 483, 501; Kansas Indians (*Blue Jacket v. Johnson County*) (US) 5 Wall 737, 755-757, 18 L ed 667, 672, 673; and New York Indians (*Fellows v. Denniston*) (US) 5 Wall 761, 18 L ed 708, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when con-

[92] Ibid. 220

[93] Ibid. 223

[94] *Kake v. Egan*, 369 U.S. 60 (1962)

fronted, in the course of subsequent developments, with diverse concrete situations."[95]

* * * * *

"Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall."[96]

* * * * *

"In the absence of a limiting treaty obligation of Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. *New York ex rel. Ray v. Martin,* 326 U.S. 496, 499****."[97]

In *Warren Trading Post Co. v. Arizona Tax Commission* (1965)[98] another case involving a licensed trader on the Navajo Indian Reservation the Court determined that the Arizona law applying a tax on the gross income was invalid. Justice Black wrote the opinion. First was rejected consideration of the issue as to the state law being inoperative because of the commerce clause, and the Court wrote the following:

"Since we hold that this state tax cannot be imposed consistently with federal statutes applicable to the Indians on the Navajo Reservation, we find it unnecessary to consider whether the tax is also barred to that part of the Commerce Clause giving Congress power to regulate commerce with Indian tribes."

The opinion then went on to review statutes of the United States regulating trade and intercourse with Indian tribes in 1790, 1802, 1834 and 1901 and Commissioner of Indian Affairs regulations, under whose authority the non-Indian

[95]Ibid. 72

[96]Ibid. 74

[97]Ibid. 75

[98]*Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965)

business was regulated on the Navajo Reservation and with reference stated:

"These apparent all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that *Congress has taken the business of Indian trading on reservations so fully in hand* that no room remains for state laws imposing additional burdens upon traders." (Emphasis added).

With particular reference to the Navajo Reservation the Court stated:

"Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control****"

* * * * *

"This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition those Congress or the tribes have prescribed ****And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax."

In *Kennerly v. District Court of Montana,* (1971)[99] the Blackfoot Indian Tribe, organized under the Indian Reorganization Act of June 18, 1834, 48 Stat. 984, 25 U.S.C. 461 et seq. had consent to the State of Montana by ordinance to share concurrent and not exclusive jurisdiction of all suits wherein the *defendant* is a member of the tribe which is brought before the Courts. It would seen reasonable to imply that if the concept of independent sovereignty of a tribe existed concurrently with powers of the United States that the tribe could have shared its powers with that of the State of Montana, unless the treaty or acts of Congress expressly denied those tribal powers.

[99]*Kennerly v. District Court of Montana*, 400 U.S. 423 (1971)

Further to deny that it had such powers could not logically be made on the infringement test in the opinion of Justice Black in the *Williams* case. The fact pattern at issue was similar to that in the *Williams* case: collection by a non-Indian to collect a debt in state court against an Indian defendant for a debt incurred on the reservation.

The applicable statute involved was Public Law 280, Act of August 15, 1953, 67 Stat. 590 where Congress provided that:

> "****any other State not having jurisdiction with respect to criminal offenses or civil causes of action, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action obligate and bind the State to assumption thereof."

Montana had not taken such action; *the statute did not provide that tribes could not take such action* – yet the Supreme Court denied state court jurisdiction. The Court qualified the *Williams* test by the qualification contained in the test that rights of tribal government are subject to a "governing act of Congress". The act of 1953 was determined to be such an act and that the powers of the United States through that act did not intend that the State of Montana was to have jurisdiction over the civil collection of a debt from an Indian defendant in state court. It is noted that the consent of the tribe was made in 1967 after the act of Congress leaving the implication that *any independent powers of the tribe are subject to the will of Congress expressed on substantive matters before the powers of the tribes are exercised.*

The 1953 act was repealed by the Civil Rights Act of 1968 (25 U.S.C. 1321 - 1326 (1964) ed. Supp-V). In Section 406 of the Act, 25 U.S.C. 1326 (1964) ed. Supp-V, consent of the United States was given for a state to have civil jurisdiction in Indian Country provided a majority of Indian members in the affected area vote for such consent. The 1967 action of the

tribe was by its governing council and not by a majority vote of the enrolled members of the tribe. In determining that since the council's ordinance was not effective to grant jurisdiction under the 1968 legislation the Court restricted its holding to the procedures required by the act such as a majority vote of the enrolled Indian members of the tribe. *Again it can be implied that not only can the substantive powers of a tribe be limited by acts of Congress not containing an express restriction on those uses of powers before the action of the tribe in exercise of those powers, but also the procedure and method can be limited by an act of Congress.*

It is impossible to reconcile the concept of Indian independent sovereignty as applied in the *Oliphant* and *Belgarde* cases with the decision in the *Kennerly* case. It also may be concluded that the relation in the traditional struggle of the jurisdiction of the United States to that of the States in relation to Indian affairs has taken on a greater importance in light of the 1953 and 1968 legislation than the protection of self-government of Indian tribes especially where a non-Indian is involved.

Commentary on the *Williams-Kake-Warren* triology has led to the following conclusions relevant to the Supreme Court's opinions. The new "*infringement test*" of the *Williams* case, state powers being excluded because of interference with tribes right to govern themselves "absent governing acts of Congress", acknowledged that complete federal preemption (*Worcester v. Georgia*) was limited to the new test announced in the rule. The *Kake* opinion conceded the test as applicable and then in determining that the Alaska Statehood Act was not one of "governing acts of Congress" that under *Williams* would bar state action concluded with the presumption that the state had such powers. Thus the weight of the decisions were dependent upon where the presumption of power lay: must proof first be that the state is included unless expressly

limited by congressional actions? *Warren* restored in part the preemption doctrine and established boundaries to the scope of federal preemption in Indian litigation – "the areas covered by acts of Congress and by federal policies concerning reservations."

As to Indian sovereignty, *Williams* for the first time recognized an independent Indian interest in self-government which stood as a barrier to state powers. *Kake* ignored the idea. In *Warren*, the court had the opportunity, but it side stepped the principal by resorting to preemption principles.

The companion case to *Kennerly v. District Court of Montana* is *McClanahan v. Arizona State Tax Commission* involving state income tax of Arizona taxing the income of a Navajo Indian derived from earnings on the Navajo Reservation.[100] The Indian taxpayer brought a claim for refund in the Arizona court, the court dismissed her claims on the basis of the *Williams* case that it was not an infringement of the tribe's right to govern, but only a burden on her. Further the Arizona court determined under the organized village of *Kake v. Egan* (1962) that the Arizona enabling act was not a "governing act of Congress" to prevent jurisdiction of the state and therefore the state had jurisdiction.

The Supreme Court, recognizing the complexity of the case, reviewed previous decisions where normally tax exemption of Indian property on a reservation rested on the doctrine of federal instrumentality and did not turn on the Indian sovereignty doctrine.[101] It then stated the following, regarded as pertinent to the doctrine of sovereignty:

> *"Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward federal preemption."*

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[100]*McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1972)

[101]Ibid. 164

> "The source of federal authority over Indian matters has been the subject of some confusion, but it is not generally recognized that the power derives from federal responsibility with Indian tribes and for treaty making. (Citation omitted). *The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.*" Compare, e.g. *United States v. Kagama*, 118 U.S. 375 (1886), with *Kennerly v. District Court*, 400 U.S. 423 (1971) (Emphasis added).
>
> "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes *were once independent and sovereign nations*, and that their claim to sovereignty long predates that of our government."[102] (Emphasis added).

The Court then noted:

> "The problem posed by this case is completely different. [*Williams* and *Kake v. Egan* cases]. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty statutes leave for the Federal Government and for Indians themselves.

The Court then distinguished the *Kennerly v. District Court*, 400 U.S. 423 (1971) by stating that if Montana courts in that state could not have jurisdiction even when the tribe consented how could a state that does not have such consent as in this case have jurisdiction.

In excluding the power of a state government to tax the income of an Indian earned on the reservation the Supreme Court's opinion in *McClanahan v. Arizona State Tax Commission* rests *not* upon the powers of Indian government, but upon the absence of powers of the state in a purely

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[102]Ibid. 172

Indian matter within the exclusive sphere of the powers of the United States Government not involving non-Indians.

D. Concept Contrary to United States Constitution

The Suquamish Indian Tribe is an organization of Indian members, chartered by the United States pursuant to an act of Congress with a Constitution approved by the Secretary.[103] It is a tribe with an Indian government of a few people, by a few people, and for a few Indian people, exercising jurisdiction as an "original" sovereign state, civilly and criminally, over all the people, lands and things on the Port Madison Indian Reservation within the jurisdiction of the United States and the State of Washington.[104]

The concept that an Indian tribe was before and after the adoption of the United States an original, independent sovereign entity with inherent internal powers of government over all people, lands and things on a reservation, located within the boundaries of the United States and a State of the Union, is repugnant to and in conflict with the very framework and basis for which the Declaration of Independence was made, the revolutionary war was fought, and the United States Constitution created: to protect the people

[103]48 Stat. 984 (1934) Indian Reorganization Act. (See Appendix to brief: 25 USC §476, Organization of Indian Tribes, 16a and 25 USC §477 Incorporation of Indian Tribes, 16a-17a.) (See Appendix to brief: Constitution and By-Laws of the Suquamish Indian Tribe: 1916 and 1965 Constitutions, 4a-5a.)

[104](Appendix to brief: Suquamish Tribal Law and Order Code, 21a; Tribal Resolution No. 77-065 Excluding non-Indians From Tribal Juries, 65a; Tribal Zoning Law, declaring building moratorium on all lands on the reservation, 47a)

within the United States from the exercise of powers of governments over them without their consent.[105]

In the United States Constitution the people for their protection consented to the formation of the Union pursuant to the Preamble: "****To secure the blessings of liberty to ourselves and our posterity****", and did consent but to two powers over them within the United States: the Federal Government with enumerated powers set forth in establishing the legislature, executive and judicial branches of the Federal Government, and the States of the Union. To further protect themselves from powers of government they consented in the constitution to laws being passed exercising federal jurisdiction over them only pursuant to those laws promulgated by their elected representatives in exercise of limitedly expressed powers of Congress, Article I, Section 8, and did establish that the United States shall guarantee to every State in the Union a republican form of government: Article IV, Section 4. In Article IV, Section 3 they insured themselves that no other States would be added to the Union with powers of government over them by prohibiting the addition of new States made within the jurisdiction of a State, or by joining of several States made within the jurisdiction of a State, or by joining of several States together, without the consent of the Legislatures of the States concerned as well as of Congress.

For individual protection in the exercise of judicial authority over them the Constitution provided in Article III, Section 2, Clause 3:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be

[105]Supra. Footnote 115 hereof: Justice Baldwin; *Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet. 17 and 18) 515 (1831)

at such place or places as the Congress may by law have directed."

In Article IV, Section 2, Clause 1, further protection was made to persons citizens of the State by declaring:

"The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Finally in order that the framework of representative government by the United States and States of the Union and the individual protections of the people would not change the Constitution of the United States was made the supreme law of the land: supreme as to laws of the United States, treaties already made or to be made, Constitutions of the State or laws of the State. Article VI, Clause 2.

A great Civil War took place between the Union of the States and a confederation of states endeavoring to separate from the Union. After many bloody battles, that attempt failed to withdraw States of the Union from the United States with governments not subject to the United States Constitution. The attempt through judicial decisions that recognize separate independent governments of Indian tribes with inherent powers of government over peoples, lands, and things within the United States and not under the United States Constitution should likewise fail.

Following the Civil War in July 28, 1868 to insure the protection of the United States Constitution from congressional or state action to persons born or naturalized in the United States, not owing allegiance to alien power (such as Indians owing allegiance to their tribe), such persons regardless of race, creed or color, born or naturalized in the United States and subject to its jurisdiction were declared citizens of the United States and citizens of the State of the Union in which they reside. By the declaration in that amendment of dual citizenship, there was extended further

protection of fundamental rights of state citizens from state action:[106]

(1) "****No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"

(2) "****nor shall any State deprive any person of life, liberty, or property, without due process of law;***"

(3) "****nor deny to any person within its jurisdiction the equal protection of the laws."

The Suquamish Indian Tribe does not have the sovereign status of a "foreign state",[107] a state not of the Union,[108] or a state of the Union. There was no delegation of authority of powers of government of the United States government to the Suquamish Indian Tribe either over Indians or non-Indians and there was no acknowledgment of sovereignty of powers of government of the Suquamish Indian Tribe in the Treaty of Point Elliott of 1855.[109] The Port Madison Indian Reservation is within the jurisdictional territory of the United States and of the State of Washington.[110]

Those persons owing allegiance to the Suquamish Indian Tribe and to whom the President of the United States issued

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[106]Amendment XIV, United States Constitution, USCA, Constitution; *Elk v. Wilkins*, Neb. 1884, 112 U.S. 94,101; *McKay v. Campbell*, D.C. Or. 1871, 2 Sawy., U.S., 118, 16 Fed Cas. No. 8,840; *Relation of Indians to Citizenship*, 1856, 7 Op. Atty. Gen. 746.

[107]*Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet.) 1 (1831)

[108]*United States v. Wheeler*, 547 F.2d. 1255,1257 Supra; Footnote ____; *United States v. Kagama*, 118 U.S. 375 (1886); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164,172-173.

[109]*Point Elliott Treaty*, (Appendix to brief 6a,) 12 Stat. 927

[110]*Draper v. United States*, 164 U.S. 241 (1896)

allotments were not made citizens of the United States under the 14th Amendment because the jurisdiction of the United States was not then over them personally but over their tribe within the meaning of the 14th Amendment. After patent was issued to those Indians by the President of the United States and the General Allotment Act Feb. 8, 1887, (c. 119, 24 Stat. 390, Sec. 6; 25 USC 348, 349) such Indians became citizens of the United States and of the State of Washington. *United States v. Celestine,* (1909).[111] While the effect of such allotment, patenting and citizenship of Indians may have not terminated the powers of the United States Government in relationship of guardianship to them, a new relationship was established because of citizenship of such Indian tribal members in relationship to that of the State.[112]

All citizens of the United States now residing on the Port Madison Indian Reservation are citizens of the State of Washington.[113] The Port Madison Indian Reservation is within the territorial jurisdiction of the State of Washington.[114]

A non-Indian while being protected under the United States Constitution from federal and state governmental action, under the concept of Indian independent tribal sovereignty does not enjoy the right to be governed by a government in which he is entitled to be represented. In addition, such individual is subject to actions by a racial government even

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[111]*United States v. Celestine*, 215 U.S. 278, 289 (1909)

[112]*State v. Big Sheep*, 243 P. 1067, 75 Mont. 219 (1926); *Dillon v. Antler Land Co. of Wyola*, C. A. Mont. 1974, 507 F.2d 940, certiorari denied 96 S. Ct. 1998, 521 U.S. 992, 44 L. Ed. 2d 482. All Indians born in the United States are now considered nationals and citizens of the United States: Citizenship Act of 1924, 8 U.S.C.A. citizens of the United States: Citizenship Act of 1924, 8 U.S.C.A. Sec. 3, and the later Nationality Act of 1940, 8 U.S.C.A. Sec. 601.

[113]*United States Constitution*, Amendment XIV.

[114]*Draper v. United States*, 164 U.S. 241 (1896)

though they were the actions of the federal or a state government he would be protected against under his individual rights as a citizen of the United States and the State of Washington.

There then exists on the Port Madison Indian Reservation a special classification of rights, privileges and immunities that a member of the tribe as a citizen of the United States and State of Washington has that a non-Indian does not have that deny to the non-Indian citizen of the United States and State of Washington residing on the Port Madison Indian Reservation his liberty and use of his property without due process or equal protection.

A comparison of the unequal rights, privileges and immunities between non-Indians and Indians, both citizens of the United States and of the State of Washington follows:

GOVERNMENTAL ACTION	NON-INDIAN	INDIAN
1. *Federal Government:* U.S. Citizenship, voting rights, law by representation	Yes	Yes
2. *State Government:* State Citizenship, voting rights, laws by representation	Yes	Yes
3. *Indian Government:* Membership, voting rights, laws by representation	No	Yes
4. *Subject to both State Laws and Independent Tribal Law on Reservation, re:*		
(a) Income tax	Yes	No
(b) Zoning of lands occupied	Yes	No
(c) Real estate taxes	Yes	No
(d) Regulation of business activity	Yes	No

(e)	Laws and Prosecution for victimless crimes by a Non-Indian	Yes	----
(f)	Laws and Prosecution for victimless crimes by an Indian	----	No
5.	*Collection of debt* in state court by non-Indian v. Indian for transaction on reservation	No	----
6.	*Collection of debt* in state court by Indian v. non-Indian for transaction on reservation	----	Yes
7.	Subject to both Federal Laws and Independent Tribal Laws on Reservation, re:		
(a)	Minor crimes by Indian v. non-Indian victim	----	No 18 USC §1152 *United States v. Wheeler*, 545 F.2d 1255 (9th Cir., 1976); On Petition for a Writ of Certiorari Supreme Court of the United States
(b)	Major crimes by Indian v. non-Indian victim	----	No 18 USC §1153 *United States v. Wheeler*, supra
(c)	Minor crimes by non-Indians v. Indian	Yes (*Oliphant* and *Belgarde* Case) 18 USC §1152; 18 USC §13	----
(d)	Major crimes by non-Indians v. Indian	Yes (*Oliphant* and *Belgarde* Case) 18 USC §1152; 18 USC §13	----

If a State of the Union were to deny voting privileges to a resident of the state based solely upon racial classification, such state action would be unconstitutional in violation of the privilege and immunities clause in accordance with Section 1 of the 14th Amendment.[115]

If action of a State becomes formerly entwined with that of a private organization causing racial discrimination in the advancement of state governmental policy whereby that organization becomes an agency or instrument of the state with governmental powers, the actions of the state as well as the private organization are in violation of the privileges and immunities clause of the 14th Amendment.[116]

What is the difference between the *Suquamish Indian Tribe* as a quasi-governmental organization based upon racial ancestry of their members exercising for the benefit and protection of their members only powers of government over non-members and their property when chartered by the United States, receiving funds from the United States Government for Law and Order, being dependent upon and subject to the laws of Congress of the United States in its relationship with the United States; and that of a *State* of the Union, using its powers of government to support a racial organization to which other citizens of the state and the United States cannot belong because of their race that exercises general powers of government over them in violation of the privileges and immunities clause of the United States Constitution?

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[115]*Rice v. Elmore*, C.C.A.S.C. 1947, 165 F.2d 387, certiorari denied 68 S.Ct. 905, 333 U.S. 875, 92 L. Ed. 1151.

[116]*Mash v. Alabama*, 326 U.S. 501 (1946); *Evans v. Newton*, Ga. 1966, 86 S. Ct. 486, 382 U.S. 296, 15 L. Ed. 2d 373 (1965). On remand 148 S.E. 2d 329, 221 Ga. 870; *Ethridge v. Rhodes*, D.C. Ohio (1967), 268 F. Supp. 83; *Bowman v. Birmingham Transit Co.*, C.A. Ala. (1960) 280 F.2d 531.

Is not the connection between the United States Government, although there was no delegation of its legislative, executive and judicial powers to the Suquamish Indian Tribe, sufficiently entwined with that of tribes to be an action of the United States Government when such action against a non-Indian would otherwise be prohibited by the United States Constitution 5th Amendment.[117]

[117] *Reid, Superintendent, District of Columbia Jail v. Covert*, 354 U.S. 1, 5, 6, 7. Should no less the rights of a citizen on a reservation be protected from an organization under the protection of the United States? In other words if the United States or its instrumentalities were to delegate its powers to a racial organization to have powers of government over persons on a reservation and deny those persons a participation in that local government and subject them to trial by jury without their peers (See Appendix to brief 65a and other matters set forth in the Statement Of The Case), why should any branch of the federal government support indirectly which they could not constitutionally do directly?

The connection has been established: *United States v. Kagama*, 118 U.S. 375, 381-382, (1886); *United States v. Wheeler*, 545 F.2d 1255 (1976)

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II.

WHETHER THE UNITED STATES, HAVING PLENARY POWER AND POWER BY LAW OVER CRIMES ON AN INDIAN RESERVATION FOR OFFENSES OCCURRING BETWEEN NON-INDIANS AND INDIANS, EXCLUDING THE JURISDICTION OF THE STATE WHEREIN THE RESERVATION IS LOCATED, HAS PROHIBITED THE TRIBE BY EXPRESSION OR IMPLICATION FROM EXERCISING SUCH JURISDICTION CONCURRENTLY WITH THE UNITED STATES OVER THOSE OFFENSES OCCURRING WITHIN THE RESERVATION UNDER LAWS OF THE UNITED STATES AND THE UNITED STATES CONSTITUTION.

If the Court determines that the Suquamish are sovereign and have the inherent power to try non-Indians for offenses against tribal law, then the question is whether Congress has ever affirmatively asserted its plenary power over Indian governments to deprive them of this jurisdiction. If the Court decides, however, that the Suquamish are not sovereign, then the question is whether Congress has ever licensed them with jurisdiction over non-Indians.

Both of these questions will be dealt with in this portion of Petitioners' brief, but in order to dispose of them, five separate sub-issues must be resolved. First, does existing federal statutory law permit the Suquamish, or any Indian government, to exercise criminal jurisdiction over non-Indians? Second, do the Suquamish have criminal jurisdiction over non-Indians pursuant to treaty? Third, has the Suquamish Law and Order Code been enacted in accordance with the regulations promulgated by the Secretary? Fourth, is the Suquamish Law and Order Code contrary to the Congressional policy inherent in sections 13 and 1152 of Title 18, United States Code? Finally, would assertion of jurisdiction in this case constitute a denial of due process?

A. Existing Federal Statutory Law Does Not Permit The Suquamish, Or Any Indian Government, To Exercise Criminal Jurisdiction Over Non-Indians.

Section 1152 of Title 18, United States Code, is the framework around which federal criminal jurisdiction within Indian country is built. The jurisdictional scheme set forth in this statute can be traced to the early days of the Republic and it has remained consistent, tribal governments are to have no jurisdiction over non-Indians for criminal acts within Indian country.

> Sec. 1152 Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place *within the sole and exclusive jurisdiction of the United States,* except the District of Columbia, shall extend to Indian country.
>
> This section shall not extend to *offenses committed by one Indian against the person or property of another Indian,* nor to *any Indian committing any offense in the Indian country who has been punished by the local laws of the tribe,* or to any case where, *by treaty stipulations, the exclusive jurisdiction* over such offenses is or may be secured to the Indian tribes respectively. (Emphasis added)

"Within the sole and exclusive jurisdiction of the United States" is the definitive phrase in section 1152. It defines what acts are criminal, what the punishment will be, and where the jurisdiction will lie, i.e. *exclusively within the United States.* In other words, within Indian country conduct is viewed as though it occurred at some place under the sole and exclusive jurisdiction of the United States. Thus only if the act is illegal under the laws of the United States can the offender be tried and punished, if convicted.

The second paragraph excepts from the operation of section 1152 the following categories of offenses: (1) where

both the perpetrator and victim are Indians; (2) where the Indian offender has already been punished by tribal law; and (3) where a treaty stipulation licenses the tribal government exclusive jurisdiction over the offense.[118]

The first two exceptions in the second paragraph of section 1152 are jurisdictional licenses.[119] When read together these exceptions license tribal governments with jurisdiction *over offenses of or among* tribal members. Because Congress has defined tribal jurisdiction within parameters of Indian offenders, tribal courts were obviously not intended to exercise criminal jurisdiction over non-Indians, and courts have so held.

In *Ex parte Kenyon,* 14 F.Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720), the issue was tribal jurisdiction over a non-Indian charged with having committed an offense within Indian country. Judge Parker gave the opinion of the Court in which he stated:

> No one is more gratified than myself to see criminals punished for their crimes by the courts of that country. But when the question is presented whether one of these [tribal] courts had jurisdiction, it is my duty, under the laws of the United States, to examine into it. *Id.* at 354.
>
> * * *
>
> But, again, if there was any crime committed, at any time, it was committed not only beyond the place over which the Indian court had jurisdiction, but, at the time it was committed, by one over whose person such court did not have jurisdiction; because, *to give this [tribal]*

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[118]These exceptions only exempt Indians from federal enclave law, and not from the general laws of the United States. Thus an Indian who violates a general federal law, such as 18 U.S.C. App. §1202(a), is not exempt from federal prosecution. *United States v. Burns*, 529 F.2d 114 (9th Cir. 1976).

[119]The third exception relating to treaty stipulations will be dealt with in detail *infra* at .

court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian.[120] (Emphasis added) *Id.* at 355.

The result in *Kenyon* was based upon construction of sections 2145 and 2146 of the Revised Statutes of 1873, presently incorporated in section 1152.

The same question was again before the court in *Ex parte Morgan,* 20 F. 298 (D.C. Ark. 1883), and that Court held:

> Right to try means jurisdiction over the place where the crime has been committed, and over the person who commits it. Now, ordinarily, properly charging a man with the crime of murder, in a state or territory, would be sufficient to show jurisdiction to try, because the courts of all the states and territories have jurisdiction to try for the crime of murder, if committed within their boundaries, regardless of who commits the crime and against whom it is committed. *But this is not so in the Cherokee Nation. The courts of that nation have jurisdiction, and can only try for the crime of murder when the person murdered is an Indian, and the one charged with the crime is also an Indian.* Rev. Stat. §2146. (Emphasis added) *Id.* at 308.

The United States Supreme Court appears to have indirectly considered this jurisdictional question in the 1891 case of *In re Mayfield,* 141 U.S. 107 (1891), where, after reviewing the state of the law the Court observed:

> The policy of Congress has evidently been to vest in the inhabitants of the Indian Country such power of *self-government* as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as

[120]If the legendary Judge Parker determined there was no jurisdiction over non–Indians by tribal courts, then there is no jurisdiction over non-Indians by tribal courts. *See Law and the American Indian,* Monroe E. Price (1973) pp. 171-172 for discussion of *Kenyon.*

> possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy, and to construe the acts of the legislative authority in consonance therewith. The *general object of these statutes* [sections 2145 and 2146 of the Revised Statutes of 1873] *is to vest in the courts of the nation jurisdiction of all controversies between Indians or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.* (Emphasis added) *Id.* at 115-116.

The third exception is the second paragraph of section 1152 sets out the only other source of tribal jurisdiction under the statute: treaty stipulation. Congress recognized that treaty commitments were binding upon section 1152, but only if they specifically licensed exclusive jurisdiction over the offense. Stated otherwise, the jurisdiction must be expressly set forth in a treaty and it must be exclusive. If this is not done then treaty obligations are subjugated to section 1152. In the instant case neither of the Suquamish agreements specifically license exclusive jurisdiction over non-Indians; discussed in detail *infra* at .

Construing section 1152 to foreclose tribal jurisdiction over non-Indians is consistent with and supported by the Major Crimes Act, 18 U.S.C. §1153. Section 1153 provides in pertinent part:

> *Any Indian* who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, *shall be subject to the same laws and penalties as all other*

persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (Emphasis added).

The jurisdictional language in sections 1152 and 1153 is essentially the same: within the exclusive jurisdiction of the United States. Nevertheless there is a difference: the phrase "shall be subject to the same laws and penalties" is not found in section 1152. The existence of this phrase in section 1153, however, serves to withdraw a portion of the jurisdictional license Indian courts acquired from the first two exceptions in section 1152; i.e., jurisdiction over offenses of or among tribal members. *See generally,* 16 Cong. Rec. 934-35 (1885) (Remarks of Rep. Bud).

Federal courts have exclusive jurisdiction over the crimes enumerated in section 1153. *Sam v. United States,* 385 F.2d 213, 214 (10th Cir. 1967); *see Felicia v. United States,* 495 F.2d 353, 354 (8th Cir. 1974), *cert. denied,* 419 U.S. 849 (1974). Therefore federal courts must also have exclusive jurisdiction over non-Indians under section 1152. Otherwise, the situation would be that section 1153 extinguished the tribal jurisdiction licensed in section 1152 with regard to Indians committing the specified crimes, but since section 1153 is silent as to non-Indians, any jurisdiction over non-Indians licensed by section 1152 would remain with tribal courts. This is an untenable construction: that Congress intended to license tribal jurisdiction over non-Indians committing "major offenses", and at the same time deny tribal courts jurisdiction over Indians committing the same illegal acts.

It is recognized that the alleged crimes at issue here do not fall within the Major Crimes Act. Respondents would presumably concede that tribal courts do not have jurisdiction over non-Indians for the enumerated "major crimes" in section 1153. But the reason that tribal courts do not have jurisdiction over non-Indians for "major crimes" is not the

Major Crimes Act, for as noted above section 1153 is silent as to non-Indians. Tribal courts can not try non-Indians for "major crimes" because section 1152 does not license them with any jurisdiction over non-Indians.

The following is a brief review of the legislative history of section 1152 and related Congressional acts, and it further illustrates the intent of Congress to retain non-Indians within the exclusive jurisdiction of the courts of the United States.

The Continental Congress passed the Northwest Ordinance in 1787, and it was later incorporated into the laws of the United States by Congress. 1 Stat. 50 (1789). Article III of this ordinance provided in part:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; *but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done them, and for preserving peace and friendship with them.* (Emphasis added) *Id.* at 52.

With passage of this provision Congress was stating its responsibility to protect Indian peoples from wrongs being done them by non-Indians. Inherent in such an admission is the inference that tribal authority did not extend to wrongs committed by non-Indians.

During the decade following enactment of the Northwest Ordinance a series of temporary measures were passed to protect Indians. These were the Indian Trade and Intercourse Acts of 1790, 1793, 1796 and 1799. 1 Stat. 137 (1790); 1 Stat. 329 (1793); 1 Stat. 469 (1796); 1 Stat. 743 (1799). These laws attempted to define substantive duties and rights in Indian affairs, and they are the taproot of section 1152.

By 1799 the Trade and Intercourse Act had expanded from seven to twenty-one sections, and most of the expansion was

directed towards non-Indian criminal conduct. Section 4 of the 1799 law was the general criminal provision.[121]

> Sec. 4 And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, *which would be punishable if committed within the United States;* or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, *such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months;* and shall also, when property is taken and destroyed, forfeit and pay to such Indian or Indians, to whom the property taken or destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed. And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence. (Emphasis added) 1 Stat. 743, 745 (1799)

Section 4 defined criminal conduct in terms of state law, but it did not adopt state sanctions. Punishment was specifically provided for: one hundred dollar fine and twelve months imprisonment. This section also provided for restitution to Indians whose property had been taken or destroyed by non-Indians; which suggests that non-Indians were not even subject to the civil jurisdiction of tribal courts.

[121]Murder of an Indian by a non-Indian was proscribed in section 6 and made punishable by death.

Section 14 applied to offenses by Indians and it empowered the President to take such steps as would be necessary to obtain satisfaction for the injury. However section 14 only covered Indian offenses committed against non-Indians beyond the boundaries of Indian territory. A restitution provision was included in section 14 also. *Id.* at 747.

Section 15 concerned jurisdiction and it provided in part:

> That the superior courts in each of the said territorial districts, and the circuit courts, *and other courts of the United States* of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be brought for trial, *shall have and are hereby invested with* full power and authority to hear and determine all crimes, offenses and misdemeanors, against this act: *such courts proceeding therein, in the same manner, as if such crimes, offenses and misdemeanors had been committed within the bounds of their respective districts.* (Emphasis added). *Id.* at 747.

Similar jurisdictional language is found in the earlier Intercourse Acts, and it must be read as vesting jurisdiction over non-Indians exclusively within the courts of the United States. *See, e.g.,* §6, 1 Stat. 137, 138 (1790); §10, 1 Stat. 329, 331 (1793); §15, 1 Stat. 469, 473 (1796).

An analysis of the aforementioned sections of the 1799 Trade and Intercourse Act reveals that Congress was expanding its protection of Indians. At the same time, however, Congress was reluctant to grant the same protection to non-Indians. Non-Indians committing criminal acts against Indians within Indian territory were prosecuted in federal court, and punished if convicted. Non-Indians also had to make restitution for any Indian property taken or destroyed. Indian offenders on the other hand, were only criminally or civilly liable for their offenses against non-Indians if they occurred beyond the boundary of Indian territory. Moreover,

there were no sanctions for offenses among Indians, these were left to be dealt with by the respective tribes.

March 30, 1802, a new Indian Trade and Intercourse Act was passed. This was merely a re-enactment of the 1799 law with minor changes; basically Congress made the 1799 statute permanent. 2 Stat. 139 (1802).

In 1817 Congress amended the Intercourse Act of 1802 and this amendment filled some of the jurisdictional gaps with regard to Indian offenses. 3 Stat. 383 (1817). The pertinent provisions of this amendment were sections 1 and 2.

> Sec. 1 That if *any Indian, or other person or persons,* shall, within the United States, and within any town, district, or territory, belonging to any nation or nations, tribe or tribes, of Indians, commit any crime, offense, or misdemeanor, which if committed in any place or district of country *under the sole and exclusive jurisdiction of the United States,* would by the laws of the United States, be punished with death, or any other punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offenses, if committed within any place of district of country *under the sole and exclusive jurisdiction of the United States.* (Emphasis added).
>
> Sec. 2 That the superior courts in each of the territorial districts, and the circuit courts and *other courts of the United States,* of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be first apprehended or brought for trial, *shall have,* and are hereby invested with, full power and authority to hear, try and punish, all crimes * * * against this act; such courts proceeding therein in the same manner as if such crimes, * * * had been committed within the bounds of their respective districts: Provided, That *nothing in this act shall be so construed as to affect any treaty now in force* between the United States and any Indian nation, or to *extend to any offense committed by one Indian against another,*

> within any Indian boundary. (Emphasis added). *Id.* at 383.

Now for the first time the phrase "sole and exclusive jurisdiction of the United States" is used. It is certainly used in the context of defining the crime and punishment, and it might also define jurisdiction. For it is possible to read the jurisdictional language in section 2 as addressing venue; i.e., venue will be proper in any federal court where the offender is apprehended or first brought to trial. Regardless of the construction of section 2, both sections clearly show that jurisdiction over non-Indians was exclusively within the courts of the United States.

The Indian Trade and Intercourse Act was completely revised in 1834, 4 Stat. 729 (1834). The revision was drafted by the House Committee on Indian Affairs and presented as part of a three bill package. H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834), p. 1. The other bills were a bill to reorganize the Department of Indian Affairs, and a bill to establish a Western Territory for the emigrant and other tribes.

Section 25 of the Intercourse Act of 1834 reads as follows:

> That so much of the laws of the United States as provides for the punishment of crimes committed within any place *within the sole and exclusive jurisdiction of the United States,* shall be in force in the Indian country: Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian. (Emphasis added) 4 Stat. 729, 733 (1834).

Section 25 illustrates that in thirty-two years since passage of the 1802 Indian Trade and Intercourse law, Congress had drastically expanded federal jurisdiction over Indian conduct. The 1834 law made Indians fully answerable for all their offenses, except for offenses among Indians. Yet the real significance of section 25 is that it articulates the basic tenets of section 1152, and "within the sole and exclusive

jurisdiction of the United States" defines the crime, the punishment and the jurisdiction. The explicit jurisdictional language contained in earlier versions of the Intercourse Acts is not to be found in the 1834 statute.[122]

Congress passed section 25 to retain criminal jurisdiction over non-Indians exclusively within the federal courts. This intent is manifested in the legislative histories of the 1834 Intercourse Act and the Western Territory bill.

The bill to establish a Western Territory was a part of the package containing the Trade and Intercourse Act. The Western territory bill met with severe criticism and never became law. *See* 10 Cong. Deb. 4764-4779 (1834). Section 9 of the Western Territory bill proposed to license tribes in the Western Territory with concurrent jurisdiction over non-Indians. *See* H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834), pp. 18, 36-37. Congress understood this was the purpose. Former President John Quincy Adams, then Representative Adams, speaking against the bill remarked:

> The bill created a double jurisdiction; it rendered a man liable to be punished twice for the same offense; for one and the same act might be an offense against both codes of law.[123]
> 10 Cong. Deb. 4771 (1834).

The Western Territory bill with its concurrent jurisdiction never became law, and its proposal of concurrent jurisdiction was one of the reasons it failed. The Indian Trade and Intercourse Act on the other hand, passed Congressional scrutiny. Congress enacted the Intercourse Act to retain

[122]To be sure there are references to federal court in the 1834 law, but none as jurisdictionally oriented as the language found in the earlier acts. *See, e.g.* §§ 23,27, 4 Stat. 729,733(1834)

[123]Recognition of the double jeopardy potential inherent in concurrent jurisdiction becomes significant later in petitioners' brief, *infra* at

non-Indians within the exclusive jurisdiction of the courts of the United States, and the House Committee Report so stated:

> In consequence of the change in our Indian relations, the laws relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision. By the act of 3d March 1817, the criminal laws of the United States were extended to all persons in the Indian country, without exception, and by that act, as well as that of 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of *some of our treaties*, and the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction: and it is rather of courtesy than right that we undertake to punish crimes committed in that territory by and against our own citizens. *And this provision [section 25] is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government.* It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits. (Emphasis added) H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834), p. 13.

In short the members of the House Committee were expressing concern about the legality of the jurisdictional scheme contained in the Intercourse Acts of 1802 and 1817. They doubted if Congress had the authority to enact such provisions,[124] and they feared expanding federal jurisdiction into Indian country would impinge upon existing treaties and the territorial act.[125] Nevertheless the Committee chose to

[124]The Committee's concern about authority to control conduct within Indian country has proven unfounded. Sections 1152 and 1153 are ample proof of such authority.

[125]The territorial act referred to may have been the Northwest Ordinance, particularly Article III of that statute, quoted *supra* at

carry these questionable provisions forward and embody them in section 25, *because it was not safe to trust Indian law in 1834.* The Committee embodied these provisions in section 25 because they intended to retain non-Indians within the sole and exclusive jurisdiction of the federal courts. This has to be what the Committee was saying; for concurrent federal jurisdiction would not impinge treaties any more than concurrent federal jurisdiction impinges state sovereignty. *To explain the Committee's concern, the jurisdiction must have been exclusive, and the jurisdiction had to be exclusive because it was not safe to trust Indian law.*

The Trade and Intercourse Act was amended in 1854 to exempt from section 25 Indian offenders who had already been punished by tribal law. 10 Stat. 269 (1854). The purpose of this amendment was to extend double jeopardy protection to Indians. *See* 23 Cong. Globe 700-701 (1854) (Remarks of Rep. Greenwood). Yet in the discussion of this amendment Congress never mentioned including non-Indians. This raises the obvious inference that non-Indians were not subject to tribal jurisdiction; otherwise they too would need double jeopardy protection.

In *Oliphant* the Court of Appeals dismissed this omission of non-Indians as congressional oversight. *Oliphant v. Schlie,* 544 F.2d 1007, 1010 fn. 3 (9th Cir. 1976). But it should be remembered that during the discussion of the Western Territory bill Congress was quick to note that concurrent jurisdiction would subject non-Indians to potential double jeopardy; *supra* at page of brief. Rather than an oversight, Congress did not include non-Indians in the amendment because non-Indians were within the sole and exclusive jurisdiction of the federal courts.

The executive policy behind section 1152 has been consistent with the legislative intent: non-Indians are within the sole and exclusive jurisdiction of the United States tribunals. And when faced with construing a statute, courts

should give great deference to the interpretations given that statute by the officers or agency charged with its administration. *Udall v. Tallman,* 380 U.S. 1, 16 (1964).

The United States Attorney General construed section 25 of the 1834 Intercourse Act as not exposing non-Indians to tribal jurisdiction. 2 *Op. Atty. Gen.* 693 (1834). This opinion was given in 1834 the year in which the statute was enacted, and the Attorney General would certainly have been more attuned to Congress's intent than would the Court of Appeals almost a century and a half later.

The Solicitor of the Department of Interior issued a lengthy memorandum opinion on the powers vested in tribal governments by virtue of section 16 of the Indian Reorganization Act, 25 U.S.C. §476. Specifically the Solicitor focused on the powers tribal governments would acquire under existing federal law, and he concluded that federally organized tribes only had those powers of self-government that had not been terminated by law or waived by treaty. Among which were the powers:

> 6. To remove or exclude from the limits of the reservation non-members of the tribe, excepting authorized Government officials and other persons now occupying reservation lands under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which non-members of the tribe may come upon tribal lands or have dealings with tribal members, *providing such acts are consistent with Federal laws governing trade with the Indian tribes.*
>
> * * *
>
> 8. To administer justice with respect to all disputes and *offenses of or among the members* of the tribe, other than the ten major crimes reserved to the Federal Courts. (Emphasis added) 55 I.D. 14, 65-66 (1934).

This was still the Solicitor's position in 1970: tribal governments have no jurisdiction over non-Indians.[126] 77 I.D. 113, 115 (1970). Additional evidence of the Department of Interior's consistent position that tribal courts lack criminal jurisdiction over non-Indians comes from the law and order regulations promulgated by the Secretary. 25 C.F.R. §§11.1 *et seq.* These regulations establish a Court of Indian Offenses and limit that Court to jurisdiction over offenses committed by Indians. *Id.* at §11.2(a).

To conclude, the legislative history of section 1152 illustrates Congress's steadfast refusal to grant tribal governments criminal jurisdiction over non-Indians. At the same time this history shows that Congress has been equally persistent in expanding federal jurisdiction over offenses of or among Indians. One of the last such expansions was the addition of kidnapping to the Major Crimes Act. 90 Stat. 585 (1976).

The Indian Civil Rights Act of 1968 is another example of such expansion, 82 Stat. 77 (1968). With passage of this law certain due process provisions were extended to "any person" subject to tribal powers of self-government. The act further limited the punishment imposed by tribal courts to a term of six months imprisonment or a fine of $500, or both, 25 U.S.C. §1302; supporters of this measure spoke in terms of *limiting the power of tribal courts in dealing with tribal members. See* 113 Cong. Rec. 13473 (1967) (Remarks of Sen. Ervin); *See* 114 Cong. Rec. 9552-53 (1968) (Remarks of Rep. Reifel).

The fact the Indian Civil Rights Act extended constitutional safeguards to all persons is not a license of tribal jurisdiction over non-Indians. The Bill of Rights protects more than criminal rights, and tribal governments can impinge these

[126]After the District Court's decision in *Oliphant* this opinion was withdrawn. However the Department of Interior has not since taken an inconsistent position.

rights also.[127] Congress passed the Indian Civil Rights Act to afford certain constitutional protections to persons who might be subject to tribes exercising their powers of self-government.[128] Since it is impossible to anticipate all instances in which such power will be exercised, Congress legislated in terms of "any person". To "bootstrap" the "any person" language into a license of jurisdiction is not in accord with the legislative history of section 1152.

Section 25 of the Indian Trade and Intercourse Act of 1834 was passed to retain non-Indian offenders within the sole and exclusive jurisdiction of the United States. The provisions of section 25 were carried forward and eventually codified as section 1152 of Title 18, United States Code. *See* Revised Statutes of 1873, sections 2145 and 2146; *See* sections 217 and 218 of Title 25, United States Code, 1940 ed. Section 1152 therefore should be considered as a continuance of the former statute (section 25), and of the policy and interpretations given that statute. 82 C.J.S. Statutes §276. In 1834 it certainly would not have been the policy of Congress to license Indian peoples with concurrent jurisdiction over United States citizens, and regardless of how bigoted it seems in retrospect, this Court is limited by the legislative intent of 1834. *See* 10 Cong. Deb. 4775-77 (1934) (Remarks of Rep. Archer); *Cf.* Sen. Rep. No. 461, 29th Cong., 1st Sess. (1846) (discusses amending section 25 to bring offenses among Indians within the jurisdiction of the United States because "murders and outrages of almost every

[127]For example, the Indian Civil Rights Act of 1968 would apply to the proposed Suquamish construction moratorium. (See appendix to brief page 47a-58a)

[128]The Indian Civil Rights extended limited constitutional protections to Indians, it was not a curtailment of rights as to non-Indians. Non-Indians enjoy the full panoply of constitutional rights, discussed *infra* at .

description have continued to be committed among them").

Finally, even if Congress intended section 25 to license Indian governments with concurrent jurisdiction over non-Indians, such a license would have been unconstitutional. At this time constitutional rights did not extend to Indians before tribal courts, *Talton v. Mayes*, 163 U.S. 376 (1896), but there was no such reduction or loss of rights with respect to non-Indians. Non-Indians would have been entitled to all their rights as guaranteed by the Constitution, and tribal courts would have deprived non-Indians of these rights. If Congress itself could not deprive citizens of these fundamental rights, how could it through exercise of its plenary power over Indians license tribal authorities to do so?

Moreover this constitutional infirmity was not cured by the Indian Civil Rights Act. The Indian Civil Rights Act only extended limited constitutional protections to persons before tribal courts. 25 U.S.C. §1302. In *Oliphant* Judge Sharp determined that non-Indians were only entitled to those due process rights set out in the Indian Civil Rights Act. (A. 52). Petitioners vehemently disagree with this determination. Non-Indians before tribal courts are entitled to the full panoply of constitutional rights. Among which are the right to vote and participate in local government; the right to a trial by jury of your peers; the right to counsel; and the right to only be governed by those laws enacted through a legislature elected by your peers.[129]

B. The Suquamish Do Not Have Criminal Jurisdiction Over Non-Indians Pursuant To Treaty.

As previously discussed section 1152 of Title 18, United States Code, provides that criminal jurisdiction may reside in

[129]Petitioners will expand this argument, *infra* at 109.

tribal authorities where "*by treaty stipulations, the exclusive jurisdiction over such offenses* is or may be secured to the Indian tribes respectively"; *supra* at . (Emphasis added). Accordingly unless jurisdiction over non-Indians is exclusive and licensed expressly by treaty, section 1152 is controlling and non-Indians remain within the sole and exclusive jurisdiction of the United States.

A treaty was signed with the Suquamish in 1855, and a land cession agreement in 1905, neither of which contain any specific reference to tribal jurisdiction over non-Indians. 12 Stat. 927 (1859); 33 Stat. 1078 (1905). In fact the only potential vehicle for Suquamish authority over non-Indians is the following language found in Article II of the 1855 treaty:

> [N]or shall any white man be permitted to reside upon the same [reserved lands] without the permission of the said tribes * * *.
> 12 Stat. 927, 928 (1859).

Article II would certainly give the Suquamish the power to exclude unauthorized persons from the Port Madison Reservation,[130] but given the dictates of section 1152 (exclusive jurisdiction by treaty stipulation), silence cannot be construed as a license of tribal jurisdiction over non-Indians. A review of other Indian treaties supports this conclusion.

In the treaty of 1785 with the Cherokees, Congress did license a limited jurisdiction over non-Indians. The extent of this license is shown by the following articles contained in that treaty:

> Article V. If any citizen of the United States, or other person not being an Indian, *shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted to the Indians for*

[130]In view of the Indian Civil Rights Act it is doubtful if the Suquamish could exclude non-Indians owning property on the Port Madison Reservation, and petitioners submit the United States Constitution also precludes such exclusion.

their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please: Provided nevertheless, That this article shall not extend to the people settled between the fork of the French Broad and Holstein rivers, whose particular situation shall be transmitted to the United States in Congress assembled for their decision thereon, which the Indians agree to abide by.

Article VI. If any Indian or Indians, or persons residing among them, or who shall take refuge in their nation, shall commit a robbery, or murder, or other capital crime, on any citizen of the United States, or persons under their protection, *the nation, or the tribe to which such offender or offenders may belong, shall be bound to deliver him or them up to be punished according to the ordinances of the United States;* Provided, that the punishment shall not be greater than if the robbery or murder, or other capital crime had been committed by a citizen on a citizen.

Article VII. *If any citizen of the United States, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian; such offender or offenders shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States;* and the punishment shall be in the presence of some of the Cherokees, if any shall attend at the time and place, and that they may have an opportunity so to do, due notice of the time of such intended punishment shall be sent to some of the tribes. (Emphasis added). 7 Stat. 18, 19 (1785)

It is apparent from Article V of the 1785 Cherokee Treaty that the Indians were only licensed to punish non-Indians for settling or attempting to settle on tribal lands. Article VII retained general criminal jurisdiction over non-Indians in either the states or the United States, and Article VI deprived the Cherokees of jurisdiction over their own tribal members

for certain offenses against non-Indians. Other early treaties contain similar articles and they illustrate that even a limited license over non-Indians was clearly spelled out by treaty. *See, e.g.*, Treaty with Choctaws, 7 Stat. 21 (1786); Treaty with Chickasaws, 7 Stat. 24 (1786); Treaty with Wyandots, 7 Stat. 16 (1785).

It is also apparent that by the 1830's this limited license was no longer being granted. Compare, for example, Article V of the treaty of 1785 with Article V in the Cherokee Treaty of 1835:

> Article 5. The United States hereby convenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: *provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.* (Emphasis added) 7 Stat. 478, 481 (1835).

Another example of Congress's refusal to license tribal governments with jurisdiction over non-Indians can be found in Article IV of the Choctaw Treaty of 1830. 7 Stat. 333 (1830):

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of [illegible] People, the jurisdiction and government of all the

persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, *not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress,* to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs. *But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws, any white man who shall come into their nation, and infringe any of their national regulations.* (Emphasis added)

The fact the Choctaws asked Congress to license tribal jurisdiction over non-Indians is evidence that no such jurisdiction could exist absent Congressional license. Furthermore, Congress did not accede to the request. Instead Congress enacted section 25 of the Indian Trade and Intercourse Act of 1834, quoted supra at .

Relying upon Article IV in their treaty, in 1834 the Choctaws attempted to punish a slave owned by non-Indians for offenses within Indian country. In a memorandum to the Secretary of War, the United States Attorney General opined that section 25 of the Intercourse Act deprived the Choctaw of jurisdiction in the matter. 2 *Op. Atty. Gen.* 693 (1834).

In 1855 the Attorney General was again called upon to render an opinion on Article IV of the Choctaw Treaty, This time the issue was criminal jurisdiction over a non-Indian adopted by the tribe. On the basis of section 25 the Attorney General concluded the Choctaws had no jurisdiction. 7 *Op. Atty. Gen.* 174 (1855). This opinion was given in the same year the Suquamish Treaty was signed. In view of this

contemporaneous refusal of jurisdiction to the Choctaws, how can it be argued that silence gives the Suquamish the license they now assert?

Silence does not bring the Suquamish within the purview of the third exception contained in section 1152: *exclusive jurisdiction by treaty stipulation.* Moreover, under the guise of interpretation, a court cannot create an authority where none exists. *Confederate Bands of Ute Indians v. United States,* 330 U.S. 169, 179 (1947); *Choctaw Nation v. United States,* 318 U.S. 423, 431-432 (1943).

In conclusion, again it must be remembered that not until passage of the Indian Civil Rights Act of 1968 were *any* constitutional safeguards *assured* to persons before tribal courts. Consequently even if a treaty had explicitly licensed the Suquamish with jurisdiction over non-Indians, such a license would have been constitutionally invalid. Treaties cannot contravene the Constitution, *Asakura v. Seattle,* 265 U.S. 332, 341 (1924); and such a license would serve to deprive non-Indian citizens of their constitutional rights. Non-Indians are entitled to the full spectrum of constitutional rights, and not just the limited version contained in the Indian Civil Rights Act. If Congress could not deprive non-Indian citizens of their right to due process of laws by statutory enactment, Congress could not indirectly do so by treaty with the Suquamish.[131]

C. The Suquamish Tribal Law and Order Code Has Not Been Enacted In Accordance With the Regulations Promulgated by the Secretary.

In 1973 the Suquamish passed their Law and Order Code to regulate conduct by all persons within the Port Madison

[131]See page 109, *infra*, for discussion of due process and jurisdiction.

Reservation, Indian and non-Indians alike.[132] (Appendix to brief page 21a). The code covers a variety of offenses, everything from assault, bigamy and rape, to theft. According to this code a tribal court is to be established and given jurisdiction over criminal matters; civil actions in which the defendant is found within the reservation; all actions involving domestic relations; and Indian probates. It is further provided that the tribal court's jurisdiction shall be concurrent and not exclusive with respect to any offense over which federal or state courts may also have jurisdiction.

Defendants are entitled to a trial by jury, but the code was amended by Tribal Resolution No. 77-065 to exclude non-Indians from the jury panel.[133] (Appendix to brief page 65a)

Tribes organizing under section 16 of the Indian Reorganization Act of 1934 are required to have their tribal constitution approved by the Secretary, and tribal constitutions are not effective until so approved. 25 U.S.C. §476; 25 C.F.R. §52.7 (1976).

The Secretary has promulgated regulations governing law and order on reservations. 25 C.F.R. §§11.1 *et seq.* (1973). These regulations establish a Court of Indian Offenses and license that Court with jurisdiction only over Indian offenders. *Id.* at §11.2(a). Section 11.1(d) of these regulations refers to those tribes, like the Suquamish, who are organized and pass their own tribal codes.

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[132]The Suquamish Constitution only permits tribal members to vote, and there are only twenty-two eligible voters on the reservation. (A.46) Therefore the Law and Order Code was enacted by less than one per cent of the reservation population.

[133]Excluding tribal judges, tribal police officers and minors from the jury panel, there only remain approximately sixteen potential jurors. Thus all defendants would be assured of having essentially the same jury.

> Sec. 11.1(d). The regulations in this part *shall continue to apply* to tribes organized under the act of June 18, 1934 * * * [Indian Reorganization Act], *until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective;* * * *. (Emphasis added).

It is further provided in section 11.1(e) of the regulations:

> Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and *after such ordinances have been approved by the Secretary of the Interior they shall be controlling,* and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe. (Emphasis added).

Clearly the Secretary's regulations governing law and order on reservations are applicable in part to tribes exercising powers of self-government pursuant to the Indian Reorganization Act. This is evident from the above emphasized language in sections 11.1(d) and 11.1(e). It is equally clear from these regulations that tribal law and order codes must comply with the tribal constitution as approved by the Secretary, and that the law and order code must also be approved by the Secretary. Otherwise the Secretary's law and order code is in effect, with its Court of Indian Offenses and jurisdiction only over Indian offenders.

Under Article III of the Suquamish Constitution is found section (h), the only power to impose criminal sanctions reserved to the tribe and approved by the Secretary.

> Sec. (h). To promulgate and enforce ordinances which shall be subject to approval by the Secretary of the Interior *governing the conduct of members of the Suquamish Indian Tribe* regarding hunting, fishing and shell fishing.

The Suquamish Constitution is in compliance with federal law: it only licenses the tribe with jurisdiction over offenses of or among tribal members. The Secretary approved the Suquamish Constitution.

The Suquamish Law and Order Code is not in compliance with the tribal constitution insofar as it subjects non-Indians to tribal jurisdiction. The Law and Order Code has never been approved by the Secretary, nor is such approval likely in view of the Department of Interior's consistent position that non-Indians are not subject to tribal jurisdiction, *supra* at .

Absent the Secretary's approval the Suquamish Law and Order Code is not within the substantive and procedural guidelines set forth in 25 C.F.R. §§11.1(d), 11.1(e) and 52.7. The code is not in compliance with the tribal constitution as approved by the Secretary; it was not approved according to the procedures established by the Secretary; and the code is beyond the scope of authority licensed the Suquamish by law i.e., to regulate conduct of or among tribal members. Therefore the Secretary's law and order regulations are still in effect, thus, the only tribal court must be a Court of Indian Offenses, and jurisdiction of that Court extends only to Indian offenders.

D. The Suquamish Code Is Contrary to the Congressional Policy Inherent In 18 U.S.C. 1152 and 18 U.S.C. 13.

Section 1152 subjects non-Indians to the general laws of the United States, but it is only a portion of the legislative plan to deal with non-Indian conduct within Indian country. The Assimilative Crimes Act, 18 U.S.C. §13, forms the other portion.

> Sec. 13. Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Section 13 is intended to conform the criminal law of federal enclaves to that of local law, *United States v. Sharpnack*, 355 U.S. 286, 289-295 (1958), and it extends to Indian country. *Williams v. United States*, 327 U.S. 711, 713 (1946). The net effect of sections 1152 and 13 is comprehensive federal criminal jurisdiction over non-Indians for offenses within Indian country. In other words, not only are non-Indians subject to the general federal enclave laws by section 1152, but section 13 subjects them to prosecution for violations of state law as well.

In the present case the thoroughness of this federal jurisdiction is evident. Oliphant could have been charged under section 1152 for violation of sections 111, 113 and 1114 of Title 18, United States Code. In addition he could be prosecuted under 18 U.S.C. §13 for violations of the following Washington statutes: RCW 9A.36.040, simple assault; RCW 9A.36.030, assault in the third degree; RCW 9A.76.040, resisting arrest; and RCW 9A.76.020, obstructing a public servant. Likewise Belgarde would have similar exposure under section 13: RCW 46.41.400, driving too fast for conditions; RCW 46.41.500, reckless driving; RCW 46.61.525, negligent driving; RCW 46.41.445, failure to exercise due care; RCW 46.41.210, failure to yield to a police vehicle; RCW 9A.36.050, reckless endangerment; RCW 9A.36.040, simple assault; and RCW 9A.76.020, obstructing a public servant.[134]

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[134]The failure to prosecute Oliphant and Belgarde under section 13 does not indicate that a jurisdictional vacuum exists within Indian country. The vacuum is one of enforcement as to minor offenses by non-Indians. The vehicles for enforcement are present in 18 U.S.C. §§ 1 and 3401, and it is up to the federal courts to routinely designate special commissions to handle these less important cases. *See The Indian, America's Unfinished Business*, Brophy and Aberle (1966), p.50.

Admittedly some of the foregoing Washington statutes were not in effect when Petitioners were arrested by the tribal police. Nevertheless this illustrates that the comprehensiveness of federal jurisdiction is a growing one, and with each session of the state legislature it is expanded.

On the other hand federal jurisdiction is not so comprehensive with respect to Indians. Sections 1153, 1152 and 13 do not apply to minor offenses among Indians; minor offenses where the Indian offender has been punished by tribal law; and to instances where treaty stipulation licenses tribal authorities with exclusive jurisdiction over the offense.[135] *See United States v. Sosseur*, 181 F.2d 873, 875-876 (7th Cir. 1950); *Acunia v. United States*, 404 F.2d 140, 142, (9th Cir. 1968). Congress intended the jurisdictional gaps left by these exceptions to be filled by tribal authorities, either through the Court of Indian Offenses and the Secretary's law and order code, 25 C.F.R. §§11.1 *et seq.*, or pursuant to tribal law and order codes as authorized by the Indian Reorganization Act and the Secretary. 25 U.S.C. §476; 25 C.F.R. §§11.1(d), 11.1(e) and 52.7.

The existence of such a comprehensive scheme indicates a congressional policy to deal differently with non-Indian offenders. Criminal conduct by non-Indians is governed exclusively by federal law, while Indian governments are left to regulate minor offenses of or among tribal members. Given this Congressional intent to retain exclusive jurisdiction over non-Indians, insofar as it subjects non-Indians to tribal jurisdiction, the Suquamish code is contrary to the legislative policy behind sections 13 and 1152 of Title 18, United States Code.

These same policy considerations and exhaustiveness of federal legislation would also indicate that Congress intended to pre-empt tribal governments in the area of non-Indian

[135]General federal criminal statutes still apply to Indians however.

offenders. *Cf. Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965). Furthermore the fact that tribal rather than state authority is involved does not make pre-emption an inapplicable doctrine.

If Indian tribes are in fact sovereign, they are still subject to the political control of the United States, *Cherokee Nation v. Georgia*, 5 Pet. 1, 30 U.S. 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886); and must submit, as do states, to the legislation of constitutionally delegated Congressional power over Indian land. To hold that federal jurisdiction over Indian land is exclusive as to the state, but concurrent with tribal jurisdiction discriminates against the natural sovereign rights of state citizens. The law is that the power of the federal government over Indian country, whether viewed as deriving from the commerce clause of federal ownership, is exclusive and not concurrent with state power. Justice demands the same rule be applied to tribal power as well.

E. Assertion of Jurisdiction Over Petitioners in This Case Would Constitute A Denial of Due Process.

The Petitioners have consistently argued this case on both jurisdictional and due process grounds: that the Suquamish were without power to try non-Indians for violations of the tribal code, and that even if the Suquamish theoretically could assert jurisdiction over non-Indians they could not in this case because to do so would violate the Petitioners' constitutional right to due process of law. The Circuit Court rejected petitioner Oliphant's jurisdictional argument but it did not rule on the due process claim.[136] Likewise the District

[136]Again the only finding the Court of Appeals made as to due process concerned exclusion of non-Indians from the venire. The Court did not consider deprivations of due process as depriving the tribal court of jurisdiction; *supra* at 1011-1012, 544 F.2d 1007.

Court rejected petitioner Belgarde's jurisdictional argument and also found his due process contentions either frivolous or premature. Certiorari was only granted on the question of tribal jurisdiction over non-Indians. However, if the Court determines that the Suquamish could assert jurisdiction over Petitioners, their due process contentions must be confronted.

This aspect of the argument can perhaps be better understood by analogizing the situation presented here with the rules set forth by this Court in the long-arm jurisdiction cases. It is established that the limit on a state's jurisdiction is when assertion of jurisdiction would be a denial of due process. In each case, the facts are examined to determine first, whether under the laws of that state jurisdiction may be assumed, and second, whether the assumption of jurisdiction would offend "traditional notions of fair play and substantial justice". *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *McGee v. International Life Insurance Company*, 355 U.S. 220 (1957). If the Court in this case decides that jurisdiction is authorized by law (either by inherent power, statute, or treaty), the next question should be whether the assertion of jurisdiction over these defendants in these cases would so offend traditional notions of fair play and substantial justice as to constitute a denial of due process.

Using this analysis, the first issue that must be resolved is what are Petitioners' due process rights in Indian tribal courts. As previously discussed, *Talton v. Mayes*, 163 U.S. 376 (1896), held that *Indians* before tribal courts were not under the protection of the United States Constitution.[137] No such

[137]The decision in Talton, rendered in 1896, reflects an attitude towards the Indians that probably would not be repeated today. However, the decision has never been judicially overturned (although its effect has been reduced by the Indian Civil Rights Act), and therefore the rights of Indians before tribal courts remain curtailed by the *Talton* decision as modified by the 1968 law. The question here, however, concerns the rights of non-Indian offenders before tribal courts, a question never directly dealt with by this Court or Congress.

limitation has been imposed upon the rights of non-Indian defendants, either by Court decision or by statute. The Court in *Talton* reasoned that Indians were not protected because:

> It follows that as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government. *Id.* at 384.

The Indian Civil Rights Act of 1968 was passed, in part, to *extend* limited constitutional rights to Indians before tribal courts. However, a determination that non-Indians are *only* entitled to those rights enumerated in the Indian Civil Rights Act would be a *deprivation* of those other constitutional rights of non-Indian citizens which are not covered by the Indian Civil Rights Act, but which have been established and recognized by this Court.[138]

Petitioners contend, therefore, that they are entitled to full panoply of rights guaranteed them under the Constitution as interpreted by this Court. They also contend that if jurisdiction were assumed by the Suquamish over them, many of those constitutional rights would be violated.

Non-Indians residing on the Port Madison Reservation are not entitled to vote in tribal elections, they cannot hold tribal office (including tribal law enforcement), they have no say in the passage of laws governing their conduct (including the tribal Law and Order Code that is before the Court), and they are denied the right to serve on tribal juries.[139] Twenty-two

[138]In the District Court decision Judge Sharp held that Oliphant had been accorded all the protections guaranteed by the Indian Civil Rights Act of 1968. (A.52).

[139]These are some of the due process denials that concern the issue of jurisdiction, they are not all the due process denials involved in these cases. The record is replete with others. Petitioners wish to preserve such denials of due process for post conviction relief in the event the Court finds for the Suquamish on the issue of jurisdiction.

Indians decide what laws are passed, administer the tribal government, and prosecute and judge any of the three thousand non-Indians who they determine have violated a tribal ordinance. To be held criminally liable for alleged violations of laws enacted and enforced by a government so constituted strikes at the very roots of our democratic system. Limitations of time and space make it impractical for Petitioners to thoroughly explore the law and develop the argument on this issue. Suffice it to say that if the Court does conclude that jurisdiction over non-Indians is authorized, Petitioners seek an additional ruling that the assumption of jurisdiction over them in this case would be a denial of due process.

III.

WHETHER THE SOVEREIGN CRIMINAL POWER AND JURISDICTION THAT THE SUQUAMISH INDIAN TRIBE MAY HAVE HAD OVER CRIMINAL OFFENSES BY OR AGAINST NON-INDIANS IN THE STATE OF WASHINGTON WAS TERMINATED BY THE LAWS OF CESSION OF THAT POWER BY THE UNITED STATES TO THE STATE OF WASHINGTON, COUPLED WITH THE ACCEPTANCE BY THE LAWS OF THE STATE OF WASHINGTON OF THAT POWER AND THE PETITION AND CONSENT OF THE TRIBE TO SUCH CESSION AND ACCEPTANCE OF JURISDICTION PRIOR TO THE EXERCISE OF SUCH POWER BY THE TRIBE.

Federal power over Indian country is plenary. *Colliflower v. Garland,* 342 F.2d 369, 377 (9th Cir. 1965). This power may be delegated to the states. *Anderson v. Gladden,* 293 F.2d 463 (9th Cir. 1961); and Congress undertook such a

delegation in 1953 with passage of Public Law 83-280 (Public Law 280). 67 Stat. 588 (1953).[140]

This law made assumption of civil and criminal jurisdiction over Indian country mandatory as to certain states, and optional for others. Section 2 was the mandatory criminal jurisdiction provision and it stated in part:

> Each of the States listed in the following table [California, Minnesota, Nebraska, Oregon and Wisconsin] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State *to the same extent* that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State *shall have the same force and effect* within such Indian country as they have elsewhere within the State. (Emphasis added) 67 Stat. 588 (1953).

Section 2(b) excepted certain subject areas from state control; e.g., hunting and fishing regulations were retained within tribal control.

Section 4 dealt with mandatory civil jurisdiction by the same states enumerated in section 2, and section 4(c) contained the only reference to concurrent tribal authority found in the act:

> Sec. 4(c). Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. *Id.* at 589.

However this concurrence was not really a jurisdictional concurrence. That is state courts were to apply tribal laws,

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[140]Petitioners do not contend that the sole basis for the valid exercise of state jurisdiction is Public Law 280. Indeed, the jurisdictional history shows that state jurisdiction was exercised prior to the passage of that Act. See Brief of Kitsap County, *amicus*, filed herein.

but section 4(c) did not license tribal courts with concurrent jurisdiction.

The specific reference to concurrent state-tribal authority in section 4(c), and the exceptions to mandatory criminal jurisdiction in section 2(b) indicate that "mandatory" states otherwise acquired exclusive jurisdiction over Indian country. If this were not so, Congress would not have provided the exceptions and reservations contained in sections 4(c) and 2(b). This construction is further supported by the subsequent legislative history of section 2.

Section 2 was amended in 1958 to include Alaska, 72 Stat. 545 (1958). Prior to this amendment the Metlakatla Indians had established a tribal court system to deal with minor offenses by tribal members; the inclusion of Alaska in section 2 "had the effect of eliminating the legal basis for the jurisdiction exercised by the [Metlakatla] community over minor offenses." H.R. Rep. No. 91-1545, 91st Cong., 2d Sess., reprinted U.S. Code Cong. & Ad. News, 4784 (1970).

Consequently Congress again amended section 2 in 1970 to withdraw the Metlakatla from exclusive state jurisdiction, 84 Stat. 1358 (1970). This amendment was passed to enable the Metlakatla Indians to exercise concurrent jurisdiction with the State of Alaska over minor offenses by tribal members.[141] H.R. Rep. No. 91-1545, *supra* at 4783, 4787. This amendment clearly indicates that section 2 extinguished any tribal concurrent jurisdiction.

The "optional" states were governed by sections 6 and 7 of Public Law 280.

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State

[141]Petitioners wish to point out that Congress did not avail itself of this opportunity to extend concurrent jurisdiction over non-Indian minor offenders.

> to amend, where necessary, their State constitution or existing statutes, as the case may be, *to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, *to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.*
> Approved August 15, 1953.
> (Emphasis added). 67 Stat. 588, 590 (1953)

There is nothing in Public Law 280 to indicate that "optional" states acquired less jurisdiction than the "mandatory" states; i.e., concurrent with the tribes as opposed to exclusive. Statutory provisions in the same act are *in pari materia* and should be construed as a unit. 73 Am. Jur. 2d Statutes §§187-191. Also equality of statehood is the rule, and Public Law 280 should be construed as vesting both the "optional" and "mandatory" states with the same exclusive jurisdiction. *See Draper v. United States,* 164 U.S. 240 (1896)

Pursuant to Public Law 280 the Washington legislature enacted chapter 240, Laws of 1957. This statute provided in part:

> SECTION 1. The state of Washington hereby obligates and binds itself to assume, as hereinafter provided, *criminal and civil jurisdiction over Indians and Indian territory,* reservation, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

> SEC. 2. Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state of Washington to the extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservation, country, and lands of the Indian body involved in accordance with the provisions of this act: * * *
> (Emphasis added).

Shortly thereafter, in 1958, the Suquamish Tribal Council passed a resolution asking the State of Washington to assume civil and criminal jurisdiction over all persons on the Port Madison Reservation.[142] May 15, 1958, Governor Rossellini proclaimed:

> The criminal and civil jurisdiction of the State of Washington shall apply to the Suquamish Indian people, their reservation, territory, lands and country, *and all persons* being and residing therein. (Emphasis added). (Appendix to brief page 60a-61a).

Thus Washington assumed the exclusive criminal and civil jurisdiction over all persons within Port Madison as authorized by Public Law 280. *See State v. Paul,* 53 Wn.2d 789, 337 P.2d (1959), *cert. dismissed,* 361 U.S. 898 (1959).

Yet assuming the Suquamish are not held to have surrendered to the exclusive jurisdiction of Washington by virtue of the 1958 tribal resolution and gubernatorial proclamation, the State subsequently acquired jurisdiction over non-Indians with enactment of Laws of 1963, chapter 36. RCW 37.12.010.

This 1963 law amended in part and repealed in part the 1957 state statute, and it reads as follows:

[142]This resolution was passed by unanimous vote of twenty-one members. (Appendix to brief pages 58a-59a).

> The state of Washington hereby obligates and binds itself to *assume criminal and civil jurisdiction over Indians and Indian territory,* reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction *shall not apply to Indians when on their tribal lands* or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:
>
> (1) Compulsory school attendance;
> (2) Public assistance;
> (3) Domestic relations;
> (4) Mental illness;
> (5) Juvenile delinquency;
> (6) Adoption proceedings;
> (7) Dependent children; and
> (8) Operation of motor vehicles upon the public streets, alleys, roads and highways; *Provided further, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.* (Emphasis added).

With this amendment the Washington legislature, without executive proclamation, assumed exclusive criminal and civil jurisdiction over all persons within Indian country,[143] *except Indians* on tribal trust lands where none of the eight subject categories were involved. Petitioners are non-Indians and therefore within the exclusive jurisdiction of the State. This is necessarily so because the only jurisdiction not assumed by Washington in 1963 was over Indians on trust lands.

[143]The Washington State Attorney General has stated the jurisdiction assumed pursuant to the 1963 law was exclusive and not concurrent with tribal jurisdiction. AGO 63-64, No. 68.

The 1963 statute also provided that tribes *such as the Suquamish*, who came under Washington jurisdiction prior to the amendment were not to be affected. It is Petitioners' position that the State of Washington either assumed jurisdiction over all persons on the reservation in 1958, or assumed jurisdiction over non-Indians in 1963.[144]

[144]In a recent decision the Ninth Circuit, *en banc* ruled the 1963 Washington statute was unconstitutional, *Confed. Bands & Tribes, Etc. v. State of Wash.*, 552 F.2d 1332 (9th Cir. 1977). This action involved a challenge by Indians, on due process and equal protection grounds, to the statute's partial assumption of jurisdiction as to fee versus non-fee Indians. The Court reasoned that notwithstanding its racial implications, the statute's impact was limited to Indian reservations therefore a rationality test was applied. The Court went on to say such partial assumption of jurisdiction with respect to Indians was irrational, and because the invalid portions of the statute could not be severed the entire law was struck down. Petitioners' contend the Court of Appeals' decision is not binding upon them for the following reasons.

First, the question of due process and equal protection of non-Indians was not before the Court; the Circuit Court couched its opinion solely in terms of Indian rights. Moreover, Indians have no standing to challenge the Washington law on the issue of non-Indians rights.

Second, non-Indians were not party to that case and could not appeal the decision.

Lastly, there can be no doubt of the Washington Legislature's intent to assume jurisdiction over all non-Indians, this was the effect of RCW 37.12.010. Furthermore such an assumption was authorized by 25 U.S.C. § 1323, and constitutionally permissible. *Cf. United States v. Antelope*, 97 S.Ct. 1395(1977). Given the intent of the Washington Legislature to assume total jurisdiction over non-Indians and the constitutionality of such an assumption, the offending portions should be severed without invalidating the entire statute. Therefore, with enactment of RCW 37.12.010 Washington assumed jurisdiction over all non-Indians within the Port Madison Reservation.

IV.

WHETHER, IF SUCH CRIMINAL POWER AND JURISDICTION THE SUQUAMISH INDIAN TRIBE MAY HAVE HAD OVER CRIMINAL OFFENSES BY NON-INDIANS HAD TERMINATED AS PROVIDED IN QUESTION III HERETO, SUCH TERMINATION WAS RESCINDED UPON SUBSEQUENT PROCLAMATION BY THE GOVERNOR OF THE STATE OF WASHINGTON PROVIDING FOR RETROCESSION OF THE CRIMINAL JURISDICTION OF THE STATE OF WASHINGTON TO THE UNITED STATES WITH LIMITATIONS THEREIN BY REFERENCE TO THE LAWS OF THE STATE OF WASHINGTON, AND THE ACCEPTANCE OF RETROCESSION BY THE SECRETARY OF INTERIOR OF THE UNITED STATES, LIMITING SUCH ACCEPTANCE TO THOSE LAWS AS PROVIDED IN THE GOVERNOR'S PROCLAMATION.

In 1968 Congress authorized the United States to take back, via retrocession, from any state "*all or any measure*" of jurisdiction acquired pursuant to Public Law 280. (Emphasis added) 82 Stat. 79; 25 U.S.C. §1323. On November 12, 1968, President Johnson, by executive order, designated the Secretary to accept any such retrocession by publication in the Federal Register of the jurisdiction retroceded and the effective date.[145]

January 11, 1971, by a unanimous vote of twenty-nine members the Suquamish resolve to have jurisdiction returned to the United States. (Appendix to brief pages 60a-61a). The same year the governor, *without legislative approval*, issued a proclamation retroceding jurisdiction to the United States,[146]

[145]Executive Order No. 11435, 33 F.R. 17339.

[146](Appendix to brief pages 62a-64a).

except as provided for in the Laws of 1963, chapter 36, quoted *supra* at .

The Secretary duly accepted retrocession in 1972 *as qualified* by the governor. 37 F.R. 7353 (Appendix to brief page 64a).

Petitioners contend that: (1) the governor's unilateral retrocession was contrary to the powers licensed the executive branch under the Washington State Constitution and therefore void *ab initio;* and (2) even if the retrocession was valid, Washington did not surrender jurisdiction over non-Indians.

A. The Governor's Unilateral Retrocession Was Contrary to the Powers Licensed the Executive Branch Under the Washington State Constitution and Therefore Void *Ab Initio*.

The powers delegated to the governor under Article III of the Washington Constitution do not include a unilateral power to repeal laws. The state legislature is empowered to enact, amend and repeal laws. RCW Const. Art. II; RCW Const. Amend. XXVI.

By the Laws of 1957, chapter 240, the legislature authorized the governor, by proclamation, to assume jurisdiction over Indian country, quoted *supra* at 115. The power to assume jurisdiction does not necessarily carry with it the power to retrocede jurisdiction.[147]

In *Oliphant* the Circuit Court held that validity of this unilateral retrocession was a matter of state law, but the effect of the retrocession was a question of federal law. The Court went on to conclude that retrocession was effective when accepted by the Secretary regardless of the invalidity of

[147]The Washington Attorney General concluded the governor could not unilaterally retrocede jurisdiction once it had been validly assumed. AGO 1972 No. 9 (*Belgarde* R.78 Exhibit H).

the governor's proclamation as a matter of state law, *supra* at 1012, 544 F.2d 1007. In support of this conclusion the Court of Appeals in *Oliphant* relied upon *United States v. Brown*, 334 F. Supp. 536 (D.C. Neb. 1971) and *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823 (D.C. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972).

Brown dealt with retrocession by the Nebraska legislature without the governor's approval. The Court held that such unilateral retrocession was invalid under the state constitution, but Judge Denney went on to say that on the basis of *Lesser v. Garnett*, 258 U.S. 130 (1922), once the Secretary accepted the retrocession it was binding. In effect the Court in *Brown* was analogizing retrocession to a contract action: the legislature's retrocession appeared valid on its face; it is difficult to require the Secretary to delve into the workings of state government; therefore, the Secretary must rely upon what appears to be valid state action. *Id.* at 540.

Even without the authority of *Lesser v. Garnett*, Judge Denney determined the retrocession was still effective because in the exercise of its plenary power over Indians, Congress could have taken back the jurisdiction without state consent:

> The federal government having the power to preempt jurisdiction over the Omaha Reservation, had the power to so define and construe the word 'retrocession' as to remove from determination of federal assumption of jurisdiction any question of the procedural validity or invalidity of the state's act of retrocession. *Id.* at 541.

The second case, *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823 (D.C. Neb. 1971), involved the same Nebraska retrocession and it too relied upon *Lesser v. Garnett* in deciding the issue. The *Omaha* Court reasoned that the Secretary's duties were ministerial; hence:

> The Secretary was not authorized to investigate the procedural or technical validity of every notice he received. In this writer's opinion once the Secretary received from the state officials what appeared to be an

> official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute. *Id.* at 832.

Petitioners submit that insofar as the Court of Appeals in *Oliphant* relied upon *Brown* and *Omaha* it erred in the following particulars. First, admittedly Congress could have taken back all state jurisdiction over Indian country without any consent on behalf of the respective states. However Congress chose not to do this. Instead Congress delegated the decision to the states. By this delegation Congress intended that the individual states analyze the question of jurisdiction over Indian country, and determine what if any portion of their jurisdiction would be best returned to the United States. Had Congress intended otherwise it would have taken back all jurisdiction without state participation. Thus the validity of the state act of retrocession is relevant in determining what jurisdiction is in fact returned to the United States, because Congress is depending upon the various state governments to decide in the best interest of all peoples concerned.

Second, the Secretary's duties are not purely ministerial, and he does have the authority to delve into the validity of state acts of retrocession. This is so because 25 U.S.C. §1323 authorizes states to retrocede all or any portion of their jurisdiction, and the Secretary is empowered to accept all or any portion of the jurisdiction retroceded. *United States v. Brown*, 334 F. Supp. 536, 542-543 (D.C. Neb. 1971); *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823, 834-835 (D.C. Neb. 1971). Since the Secretary has the discretion to decide how much jurisdiction to accept, his duties are not ministerial. Presumably his exercise of this discretion will be an intelligent purposeful one: founded on the desires of the state as well as the peoples involved. This necessitates his looking beyond the form of retrocession into the substance of it.

Lastly, Petitioners respectfully submit that *Lesser v. Garnett*, 258 U.S. 130 (1922), is of questionable authority. *Lesser* concerned an attack upon the Nineteenth Amendment, women's sufferage. The Secretary of State received notice that the requisite number of states had ratified the amendment, and he proclaimed the amendment adopted as part of the Constitution. Subsequently an action was commenced challenging the legality of the West Virginia and Tennessee ratifications. In disposing of the challenge the Supreme Court held:

> As the Legislatures of Tennessee and West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. *Id.* at 137.

Under the rationale in *Lesser* Congress could propose a constitutional amendment to the effect that Indians can no longer vote, seek elected office or serve on juries. Thirty-six governors, without legislative approval, notify the Secretary of State that the amendment has been ratified, the Secretary of State proclaims it a part of the Constitution and the courts are powerless to look into the matter. If this is the law, concededly Petitioners lose on this issue.

But this cannot be the law. The Constitution is by its very nature substantive. The rights it guarantees every citizen are substantive, and a state's rights are substantive too. To bind the State of Washington by the unilateral act of the governor violates the State's sovereign rights as guaranteed by the Tenth Amendment, and as authorized by Congress in section 1323. It is for the Washington Legislature to make the decision as to retrocession, and to make the decision in the best interest of all the people as Congress intended. It is not for the governor and twenty-nine members of the Suquamish Indian Tribe to decide the interests of three thousand non-Indians.

B. Even If the Governor's Unilateral Retrocession Was Valid, Washington Did Not Surrender Jurisdiction Over Non-Indians.

It cannot be denied that the Court of Appeals, in *Oliphant*, failed to address this issue. It is equally clear that with passage of RCW 37.12.010 the State of Washington assumed jurisdiction over non-Indians in Indian country without consent of the tribes involved or gubernatorial proclamation, quoted *supra* at 116 and 117. This statute also excepted tribes, like the Suquamish, who had already come under State jurisdiction pursuant to the Laws of 1957, chapter 240, *supra* at 115 and 116.

Likewise it cannot be denied that the retrocession was qualified and accepted as such. In the exact language of the proclamation:

> IT IS FURTHER PROCLAIMED, that any jurisdiction exercised by the State of Washington over the Suquamish Port Madison Indian Reservation *except as provided* under Chapter 36, Laws of 1963 (RCW 37.12.010 - 37.12-060), is retroceded to the United States. (Emphasis added) (Appendix to brief page 64a).

And the Secretary accepted as follows:

> * * * retrocession to the United States of all jurisdiction exercised by the State of Washington over the Port Madison Indian Reservation, *except as provided* under Chapter 35(sic), Laws of 1963 (RCW 37.12.010 - 37.12.060), as offered on August 26, 1971, by proclamation of the Governor of Washington. (Emphasis added) (Appendix to brief page 65a).

Petitioners assert this retrocession and acceptance should be interpreted in one of the following ways, every one of which retains non-Indians within the jurisdiction of the State of Washington. First, since the jurisdiction retroceded was defined in terms of RCW 37.12.010, subsequently declared unconstitutional, the Secretary's acceptance was similarly

unconstitutional and the United States took back nothing. *See Confed. Bands & Tribes, Etc. v. State of Wash.*, 552 F.2d 1332 (9th Cir. 1977).

Second, the governor only retroceded jurisdiction over Indians on trust land not involved in any of the eight subject areas listed in RCW 37.12.010, and this is all the jurisdiction the Secretary accepted.

Finally, the retrocession proclamation provided that all jurisdiction over Port Madison was to be given back to the United States except as provided under RCW 37.12.010, and RCW 37.12.010 specifically provided that tribes already under Washington jurisdiction would remain totally under state control. The Suquamish fall within the proviso, therefore, all of Port Madison remains within the jurisdiction of the State of Washington.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the Ninth Circuit as to Mark David Oliphant, and the decision of the United States District Court for the Western District of Washington as to Daniel B. Belgarde, should be reversed, and writs of habeas corpus be issued declaring the Suquamish Indian Tribe and additional Respondents without jurisdiction over Petitioners in these matters.

If the Court of Appeals and District Court decisions are affirmed, Petitioners seek an additional ruling that the assumption of jurisdiction over them in these cases would be a denial of due process. In the event the Court declines to rule, or rules against Petitioners on this question, Petitioners wish to preserve any denials of due process for post conviction relief.

Respectfully submitted,

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APPENDIX TO BRIEF

UNITED STATES CONSTITUTION (1787)

(1) *Preamble:*

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

(2) (a) Article I, §1, *Legislative Powers Vested in Congress:*

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

(b) Article I, §8, *Powers of Congress*

Regulation of Commerce: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

(3) Article I, §9, Clause 2, *Privilege of Writ of Habeas Corpus Not To Be Suspended.*

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

(4) Article III, §2, Clause 3, *Trial by Jury to be Held in the State Where the Said Crimes Shall Have been Committed.*

Criminal Trial by Jury: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

(5) Article IV, §2, Clause 1, *Privileges and Immunities of Citizens in the Several States.*

Privileges and Immunities: The Citizens of each State shall be entitled to Privileges and Immunities of Citizens in the several States.

(6) Article IV, §4, *Guarantee to Every State a Republican Form of Government.*

Republican Government: The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

(7) Article VI, Clause 2, *Supremacy Clause*

Supreme Law of Land: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENTS

(8) AMENDMENT V, *Due Process of Law*

No person shall be deprived of life, liberty, or property without due process of law.

(9) AMENDMENT VI, *Jury Trial for crimes, and procedural rights* (Impartial jury of the State)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature, and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(10) AMENDMENT XIV, *Due process and equal protection of law guaranteed.*

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTIONAL PROVISIONS OF THE STATE OF WASHINGTON

(1) Article II, §1, *Legislative Powers, Where Vested.*

The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the State of Washington.

(2) Article III, §5, *General Duties of Governor.*

The governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.

(3) Article XXVI, Compact with the United States. #Second.

(. . . . within the boundaries of this state. . all lands . . . . owned or held by any Indian or Indian tribes . . . . shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .)

That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian

lands shall remain under the absolute jurisdiction and control of the congress of the United States.

CONSTITUTION AND BY LAWS OF SUQUAMISH INDIAN TRIBE (1916)

Preamble to Constitution

We, the lineal descendents of our noted chiefs, Kitsap and Sealth, together with the descendents of their associate counselors, and our tribe in general, in order to preserve our Council and promote justice and friendship, do hereby unite our good will for better conditions and understanding, to be bound and sealed in this Constitution.

Article I of By-Laws

The principal object of this Constitution and By-Laws is to assure the legal tribal rights of all members, who in good faith shall be subject to its fundamental spirit by their support.

CONSTITUTION AND BY LAWS OF SUQUAMISH INDIAN TRIBE APPROVED BY SECRETARY OF INTERIOR (1965)

Preamble to Constitution

We, the people of the Suquamish Indian Tribe of the Port Madison Reservation in the State of Washington, in order to establish our tribal organization, to develop our community resources, to administer justice, and to promote the economic and social welfare of ourselves and our descendants, do hereby establish this constitution and bylaws.

Article I - *Territory.*

The territory in which the Suquamish Tribe has a beneficial ownership interest includes that portion of the Port Madison Reservation remaining in an unallotted status at the time of the approval of this constitution and bylaws, and any other lands which may be acquired for or by, and held in the name of, the Suquamish Tribe. The jurisdiction of the tribe over such lands, and over the allotted lands within the original

boundaries of the Port Madison Reservation, shall not be inconsistent with applicable Federal and State laws. However, nothing in this Article shall be construed as restricting the treaty hunting and fishing rights of members, including the right to fish in usual and accustomed places.

Article II - *Membership,* Section I (Indian Blood)

The membership of the Suquamish Indian Tribe shall consist of the following:

(a) All persons of Suquamish Indian blood whose names appear on the official census roll of the tribe as of January 1, 1942; Provided, that such persons have not relinquished membership in the Suquamish Tribe or have not become enrolled as members of any other tribe, band or Indian Community; and Provided, further, that such roll may be corrected subject to the approval of the Secretary of the Interior.

(b) All children born between January 1, 1942, and the date of approval of this constitution and bylaws, to persons who are members; Provided that those children who have been enrolled as members of other tribes shall be eligible if within one year from the date of approval of this constitution, they or their parents acting in their behalf, apply for membership in the Suquamish Tribe and they relinquish membership in any other tribe.

(c) All persons of 1/8 or more Indian blood born to any member of the Suquamish Tribe, after the date of approval of this constitution and bylaws.

Article III - *Powers of the Governing Body*, Section 1, (h).

The governing body of the Suquamish Indian Tribe shall be known as the Suquamish Tribal Council. The Council shall have the following powers and duties subject to any limitations imposed by applicable State laws or statutes of the United States and the regulations of the Secretary of the Interior:

(h) To promulgate and enforce ordinances which shall be subject to approval by the Secretary of

the Interior governing the *conduct of members of the Suquamish Indian Tribe regarding hunting, fishing, and shell fishing.*

Article IV - *Manner of Review,* Section 1

Any resolution or ordinance which by the terms of this constitution is subject to review by the Secretary of the Interior, shall within 10 days of its enactment be presented to the Superintendent or Officer in Charge of the agency exercising jurisdiction, who shall within 10 days after its receipt, approve or disapprove it.

Article IX - *Referendum*

Upon receipt of a petition of at least 25 percent of the eligible voters of the tribe, or upon the request of the majority of the members of the tribal council, the Chairman shall call a general council meeting to be held within 30 days of receipt of such petition or request, to consider any enacted or proposed ordinance or resolution, and the vote of the majority of the qualified voters in such referendum will decide whether the enacted or proposed ordinance or resolution shall thereafter be in effect; Provided that 25 percent or more of the eligible voters shall vote in such referendum.

(Emphasis added)

TREATY OF POINT ELLIOTT, 12 STAT. 927 (1859)

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENT SHALL COME, GREETINGS:

Whereas a treaty was made and concluded at Muckl-te oh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen and

delegates of the Dwamish, Suquamash, Sk tahl-mish, Samahmish, Smalh kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, Skagit, Kik-i-allus, N'Quentl-ma-mish, Sk-tah-lejum, Stoluck-wha-mish, Sno-ho-mish, Swin a mish, Squin ah-mish, Sah ku-mehu, Noo-wha-he, Nook-wa-chah-mish, Mee see-qua-quich, Cho bah-ah-bish and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by law; which treaty is in the following words and figures to wit:

Articles of agreement and convention made and concluded at Muckl-te oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Dwamish, Suquamish, Sk-tahl-mish, Samahmish, Smalh-kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Me-see-qua-quich, Cho-bah-ah-bich, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the straits of Fuca, and crossing the same through the middle of Admiralty

inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's canal and Admiralty inlet to the portage known as Wilke's portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty inlet, and thence round the foot of Vashon's island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE II. *There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison,* called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's island called Shais-quihl, and the island called Chah-choo-sen, situated in the Summi river at the point of separation of the mouths emptying respectively into Gellingham bay and the gulf of Georgia; all which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; *nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent*, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE III. *There is also reserved from out of the lands hereby ceded the amount of thirty-six sections,* or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish river, including Tulalip bay and the before mentioned Kit-seh-do creek, for the purpose of establishing thereon and agricultural and industrial school, *as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade mountains in said Territory*; provided, however, that the President may establish the

central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE IV. *The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year* after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens.

ARTICLE VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VII. *The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place*

within said Territory as he may deem fit, or remunerating them for their improvements and the expenses of such removal, *or may consolidate them with other friendly tribes or* bands; and *he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege*, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the 6th article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. *The said tribes and bands acknowledge their dependence on the government of the United States*, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. *And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.*

ARTICLE X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is

guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE XII. *The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.*

ARTICLE XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars, to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

(Emphasis added)

(SIGNATURES AND RATIFICATION
OMITTED IN PRINTING)

UNITED STATES STATUTES

(1) 33 STAT. 1078 and 1079, FIFTY-EIGHTH CONGRESS, SESS. III, §1479 (1905), SECTION 6, ARTICLE I: ARTICLE II: ARTICLE III: ARTICLE IV

Sec. 6. That the following agreement made and concluded on the twenty-eighth day of May, nineteen hundred and four, by James McLaughlin, United States Indian inspector, *with the male adult Indians residing on the Port Madison Indian Reservation*, in the State of Washington, is hereby accepted, ratified, and confirmed.

This agreement made and entered into on the twenty-eighth day of May, nineteen hundred and four, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Indians belonging on the Port Madison Indian Reservation, in the State of Washington, witnesseth:

ARTICLE I. The said Indians belonging on the Port Madison Indian Reservation, in the State of Washington, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States all right, title, and interest which they may have in and to that portion of the unallotted lands of the said Port Madison Indian Reservation, in the State of Washington, described by legal subdivision of Government survey as lots four and five, in section twenty-one, township twenty-six north, range two east, Willamette meridian, containing forty-eight and seventy-five one-hundreths acres, more or less.

ARTICLE II. In consideration of the lands ceded, granted, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to pay to the said Indians per capita in cash the sum of three thousand nine hundred dollars, share and share alike, to each man, woman, and child belonging on the said Port Madison Indian Reservation, within ninety days after the ratification of this agreement, and also to pay to certain of said Indians, within the said time limit, the sum of three thousand six hundred and twenty-eight dollars for certain personal improvements, and four hundred and sixty-six and seventy-five one-hundredths dollars to the treasurer of the Port Madison Indian Improvement Club for floating wharf, and three hundred and fifty-five dollars to the treasurer of the board of trustees of the Port Madison Indian Church, as listed in schedule of appraisement of said improvements upon lands ceded by Article I of this agreement, a copy of which schedule of appraisement is hereunto attached. And it is further agreed that the disposition of the sum of eight hundred and eighty-four dollars, the appraisement of the Government schoolhouse and farmer's dwelling, and two hundred dollars for cable anchorages of two telegraph companies, as per attached schedule, is discretionary with the Secretary of the Interior, and may be expended, in his discretion, in the erection of a day school building *upon the remaining thirty-six acres unallotted subdivision of the Port Madison Indian Reservation*, described as lot three, section twenty-one, township twenty-six north, range two east, Willamette meridian, which unallotted subdivision adjoins lot four of the trace ceded by Article I of this agreement.

ARTICLE III. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Port Madison Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this agreement.

ARTICLE IV. This agreement shall take effect and be in force when signed by United States Indian Inspector James McLaughlin and *by a majority of the male adult Indians parties hereto*, and when accepted and ratified by the Congress of the United States.

In witness whereof the said James McLaughlin, United States Indian Inspector, on the part of the United States, and *the male adult Indians belonging on the Port Madison Indian Reservation*, in the States of Washington, have hereunto set their hands and seals at the Port Madison Subagency, Kitsap County, Washington, this twenty-eighth day of May, anno Domini nineteen hundred and four.

* * *

(Emphasis added)

(2) 25 USC §71 *Future Treaties with Indian Tribes*

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

(3) TRADE AND INTERCOURSE ACTS:

18 USC §1151 *Indian Country Defined*

Except as otherwise provided in section 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 USC §1152 *Laws Governing*

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by an Indian against the person or property of another Indian, nor to any Indians committing any offense in the Indian country who has been punished by the local laws of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.
(Emphasis added)

4 STAT. 729(1834) §*25 Indian Trade and Intercourse Act*

AND BE IT FURTHER ENACTED; that so much of the laws of the United States as provides for the punishment of crimes committed *within the sole and exclusive jurisdiction of the United States*, shall be in force in the Indian country: Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.
(Emphasis added)

(4) 18 USC §1153 *MAJOR CRIMES ACT*

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, *shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.*

* * *

(Emphasis supplied)

(5) 18 USC §13 *ASSIMILATIVE CRIMES ACT*

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(6) 48 STAT. 984(1934) *INDIAN REORGANIZATION ACT*

25 USC §476 *Organization of Indian Tribes*

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and *approved by the Secretary of the Interior*, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be *ratified and approved by the Secretary* in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council *by existing law*, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council *of all appropriation estimates or Federal projects for the benefit* of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.
(Emphasis added).

25 USC §477 *Incorporation of Indian Tribes*

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power

to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and *such further powers as may be incidental to the conduct of corporate business, not inconsistent with the law*, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.
(Emphasis supplied)

(7) 67 STAT. 588(1953) *PUBLIC LAW 83-280*

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to *the assumption of civil and criminal jurisdiction* in accordance with the provisions of this Act.
(Emphasis added)

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, *by affirmative legislative action, obligate and bind the State to assumption thereof.*
(Emphasis supplied)

(8) 82 STAT. 77(1968) *INDIAN CIVIL RIGHTS ACT:*

25 USC §1302 *Constitutional Rights*

No Indian tribe in exercising powers of self-government shall–

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable

search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any property for a public use without just compensation;

(6) deny *any person* in a criminal proceeding the right to a *speedy and public trial*, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and *at his own expense* to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishment, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury or not less than six persons.
(Emphasis supplied)

25 USC §1303 *Habeas Corpus*

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

25 USC §1323 *Retrocession of Jurisdiction*

The United States is authorized to accept a retrocession by any State *of all or any measure* of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of * * * the Act of August 15, 1953(67 STAT.

588)[Public Law 83-280], as it was in effect prior to its repeal by subsection (b) of this section.

Section 7 of the Act of August 15, 1953(67 STAT. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.
(Emphasis added)

WASHINGTON STATE STATUTES

(1) Laws of 1957, Chapter 240

An act providing for the assumption of criminal and civil jurisdiction over certain Indians and their reservations and lands as authorized by federal law [Public Law 83-280]; providing the time and method thereof, and the duty of the governor with respect thereto; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. The State of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country, and lands within this state in accordance with the consent of the United States * * *.

Section 2. Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the State of Washington to the extent authorized by federal law, *he shall issue* within sixty days *a proclamation to the effect* that such jurisdiction shall apply to all Indians and all Indian * * * country, * * *.

Section 3. Sixty days from the date of issuance of any proclamation of the governor * * *, *the State of Washington shall assume jurisdiction over offenses committed by or against Indians in the lands prescribed in the proclamation to the same extent that this state has jurisdiction over offenses committed elsewhere within this state and the criminal laws*

of this state shall have the same force and effect within such lands as they have elsewhere within this state.
(Emphasis added)

(2) Laws of 1963, Chapter 36, Amending Laws of 1957, Section 1, RCW 37.12.010.

(Chapter 240, 1957 Laws – Section 1)

Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953. (Public Law 280, 83rd Congress, lst Session),

(Amendment Laws 1963, Chapter 36 *added* following) but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public Assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) OPERATION OF MOTOR VEHICLES UPON THE PUBLIC STREETS, ALLEYS, ROADS AND HIGHWAYS: PROVIDED FURTHER, THAT INDIAN TRIBES THAT PETITIONED FOR, WERE GRANTED AND BECAME SUBJECT TO STATE JURISDICTION PURSUANT TO THIS CHAPTER ON OR BEFORE MARCH 13, 1963 SHALL REMAIN SUBJECT TO STATE CIVIL AND CRIMINAL JURISDICTION AS IF CHAPTER 36, LAWS of 1963 HAD NOT BEEN ENACTED.

(Emphasis added)

SUQUAMISH LAW AND ORDER CODE

PREAMBLE

We, the people of the Port Madison Reservation hereby establish this Code of Laws (1) to protect the lives and property of all persons within the boundaries of the Port Madison Reservation (2) to protect the natural resources and all other property of the Suquamish Tribe (3) to protect the life-ways of the Suquamish Indian people (4) to protect the rights of all persons within the boundaries of the Port Madison Reservation (5) to assure the peace and tranquility of the people within the Port Madison Reservation.

We do this as an act of self-determination that the people within the boundaries of the Port Madison Reservation have the right to protect and defend themselves and their property from illegal and unlawful acts of others where such protection is not offered by the laws of the State of Washington of the United States or by the officials thereof.

CHAPTER I
JUDICIAL CODE
ARTICLE I
JUDICIAL POWER

Section 1. *Power Vested.* The Judicial power of the people of the Port Madison Reservation shall be vested in the Suquamish Tribal Courts.

Section 2. *Scope.* The Judicial powers shall extend to all cases and controversies in law and equity arising under the laws of the Port Madison Reservation.

ARTICLE II
THE COURT OF APPEALS

Section 1. *Composition.* The Suquamish Tribal Court of Appeals shall consist of all of the judges of the Suquamish Tribal Court except the judge from whose decision the appeal is taken.

Section 2. *Jurisdiction.* The Court of Appeals shall have jurisdiction to hear and determine appeals from final judgments of the Trial Court of the Suquamish Tribe and all such appeals shall be tried as a new trial except for those issues of fact already determined by a jury. The Chief Judge shall have power to issue any order or writ necessary and proper to the complete exercise of the jurisdiction of the Court of Appeals.

ARTICLE III
THE TRIAL COURT

Section 1. *Composition.* The Trial Court of the Suquamish Tribal Court shall consist of one chief judge and one or more Associate Judges who shall be elected by the Suquamish General Council.

Section 2. *Scope.* In addition to duties and powers specifically enumerated under the Judicial Code, judges of the trial court shall have the same duties and powers as judges of the Juvenile Court of the Port Madison Reservation when so assigned.

Section 3. *Jurisdiction.* The Tribal Court of the Port Madison Reservation shall have original jurisdiction over:

(a) All crimes committed within the territorial jurisdiction of the Port Madison Reservation and all other Tribally owned lands, on any land allotted, Fee Patent lands, public lands, lakes, streams, waterways, highways and beaches,

except the major crimes as defined by the Act of March 3, 1885 (23 Stat. 362) as amended which are within the jurisdiction of the Federal Government.

(b) All civil actions in which the defendant is found within the Port Madison Reservation and is served with process within the territorial jurisdiction of the Tribal Court of the Suquamish Tribe.

(c) All actions involving domestic relations including, but not limited to divorce, adoptions, juvenile matters.

(d) All Indian probate matters, whether real or personal, including estates of minors, incompetents and decedents, except for restricted trust property contained therein.

All other matters which may hereafter be placed within the jurisdiction of the Tribal Court of the Suquamish Tribe by action of the Suquamish Tribal Council, State of Washington or Congress of the United States.

(f) The Tribal Court of the Suquamish Tribe shall have power to issue any order or writ necessary and proper to the complete exercise of its jurisdiction.

(g) The Tribal Court of the Suquamish Tribe shall have jurisdiction over all persons who enter the exterior boundaries of the Port Madison Reservation for whatever purposes; said act of entry being construed as consent to such jurisdiction. Notices to this effect are to be placed on all public and private roads leading into the Port Madison Reservation, and upon streams and lakes therein and at reasonable intervals along the beaches within the exterior boundaries of the reservation.

(h) The Jurisdiction of the Tribal Court of the Port Madison Reservation shall be concurrent and not exclusive with respect to an offense over which a Federal Court or State Court may have lawful jurisdiction; however, where the State or Federal authorities take no action for whatever reason against any person who is alleged to have committed such an offense, the Trial Court of the Port Madison

Reservation may assume jurisdiction over the alleged offender if the offense is in violation of the Suquamish Code.

The territorial jurisdiction of the Trial Court of the Port Madison Reservation shall embrace all land and property within the exterior original boundaries of the Port Madison Reservation.

ARTICLE IV
JUDGES

Section 1. *Qualifications.* Every judge shall be a Tribally recognized member of the Suquamish Tribe, shall be (35) thirty five years of age or over, of good moral character, and shall not have been convicted of a felony, or, convicted of a misdemeanor within the year immediately preceding his appointment, shall have completed high school or have a G.E.D. so as to be capable of understanding the provisions of this Code, court procedures and the duties of the office.

Section 2. *Term of Office.* Each judge shall hold office for an indefinite term but in no event less than six years.

Section 3. *Removal.* Any judge may be removed from office after due notice and a hearing by two-thirds vote of the Suquamish General Council, if there is reasonable cause to believe the judge to be guilty of malfeasance or misfeasance in office, neglect of duty, mental or physical incapacity to perform the duties of his office or the judge has been convicted of a felony in a State or Federal Court since entering office.

Section 4. *Salaries.* The salaries of the Chief Judge and Associate Judges shall be fixed and paid when funding is available.

Section 5. *Other Duties.* The Chief Judge, in addition to his judicial duties, shall have the authority to supervise the work of Associate Judges and court personnel.

Section 6. *Powers.* The Chief Judge and Associate Judges shall hear and determine all matters which are duly and regularly filed in the Tribal Court of the Port Madison Reservation. They shall have power to issue subpoenas to compel attendance of witnesses on their own motion or on the motion of a party litigant, and may punish for failure to comply with such subpoena of the Tribal Law and Order Code.

Section 7. *Rules of Court.* The Chief Judge and Associate Judges may adopt rules of pleading, practice and procedure applicable to any or all proceedings in the Trial Court and in the Court of Appeals. In addition, they may adopt uniform rules for the admission of evidence and may require the use of standard forms for pleadings, motions and other instruments filed in Court by litigants, as well as for judgments, writs, warrants and other court orders.

Section 8. *Seal.* The Court of the Port Madison Reservation shall adopt a seal which shall be used by the clerk of the court when he prepares certified copies of any official documents of the court, for use outside the court.

Section 9. *Disqualification.* No judge shall be qualified to act in any case where he or she has an interest, is or has been a material witness, is related to any party or their counsel by marriage or blood in the first or second degree. A Judge may be disqualified upon his own motion or by application by any party in the proceeding upon filing a verified motion in writing.

Section 10. *Assignments.* The Chief Judge shall hear all cases, criminal and civil, arising under this Code, except those which he has assigned to an Associate Judge.

ARTICLE V
CLERK

Section 1. *How Appointed.* The clerk of the Court shall be appointed by the Chief Judge.

Section 2. *Qualifications.* No person shall be appointed a Clerk of the Court unless the appointee:

(a) Is 21 years of age or older and of good moral character.

(b) Has never been convicted of a felony or has not been convicted of a misdemeanor within the past year.

(c) Speaks, writes and understands the English language fluently and has demonstrated competence in the skills essential to the preparation and maintenance of court records.

Section 3. *Duties.* The clerk shall render assistance to the law enforcement office and to residents of the Reservation in the drafting of complaints, subpoenas, warrants, and any other documents necessary to the functions of the court. The Clerk shall attend and keep a record of the Suquamish Tribal Court and Court of Appeals, read the complaints, administer oaths, collect all fines paid by or of the Court and account therefor. The clerk shall perform other duties as provided in this Code and as may be directed by the Chief Judge.

Section 4. *Bond.* The Clerk shall be bonded.

ARTICLE VI
RECORDS

Section 1. *Docket.* The Clerk shall keep a Docket in which shall be entered the names of each plaintiff and defendant in any civil or criminal proceeding, the character of the proceeding, the date of issuance and the return date of any process issued therein, the appearance or default of parties summoned, the date and amount of any judgment, any appeal thereon and all other proceedings there. The Clerk shall keep and maintain such other records as provided in this Code and as may be directed by the Chief Judge.

Section 2. *Copies of Proceedings.* Any party may obtain a certified copy of such proceedings from the clerk by payment of the cost thereof.

Section 3. *Copies of Laws, Ordinances, etc.* The Suquamish Tribal Court of the Port Madison Reservation shall be provided with copies of this Code and copies of other Federal and State laws and regulations and tribal ordinances deemed by the Court necessary, proper and applicable to the rights and conduct of persons subject to the jurisdiction of this Court and to its judicial powers and responsibilities.

CHAPTER III
CRIMINAL OFFENSES
ARTICLE I
OFFENSES

Section 1. *Abduction.* Any person who shall willfully take away or detain another person against his will or takes, detains or entices a child under eighteen from custody of its parent or other lawful custodian, when he lacks lawful permission to do so, shall be guilty of an offense of abduction and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than$500 or both, with costs.

Section 2. *Abuse of Office.* Any person acting or purporting to act for the Suquamish Tribe in an official capacity, taking advantage of such official or purported capacity, who knowing that his conduct is illegal, shall subject another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights or shall deny or impede another in the exercise or enjoyment of any right, privilege, power or immunity, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500 or both, with costs.

Section 3. *Adulteration of Food and Drink.* Any person who shall manufacture, sell or keep or offer for sale any food, drug or drink in the making of which any harmful substance is used shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250 or both, with costs.

Section 4. *Abandoned Iceboxes and other Containers.* Any person who shall have in his premises any abandoned chest, icebox or other container not in active use, any door to which has a latch or lock which automatically fastens upon the door being closed and which cannot be readily opened from the inside, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $100 or both, with costs, and shall be ordered to remedy the situation at his own expenses.

Section 5. *Assault.* Any person who shall attempt to threaten bodily harm to another person through use of unlawful force or violence or verbal threats shall be guilty of assault, and upon conviction thereof, shall be sentenced to confinement for not more than thirty (30) days or to pay a fine of not more than $60.00 or both, with costs. In the discretion of the Court, such offender may be required to furnish a satisfactory bond to keep the peace.

Section 6. *Assault and Battery.* Any person who shall willfully strike another person or otherwise inflict bodily injury on another person, or who shall cause another to harm himself, shall be guilty of assault and battery and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days, or to pay a fine of not more than $120.00 or both, with costs. In the discretion of the Court, such offenders shall be required to furnish a satisfactory bond to keep the peace.

Section 7. *Bigamy.* Any person who being married to another, marries any other human, shall be guilty of an

offense of bigamy; provided that no person shall be guilty thereof who believes that the prior spouse is dead or whose original spouse shall have been absent for seven successive years, without being known to be living, or if the original marriage has been dissolved, pronounced void and annulled by the decree of a court of competent jurisdiction. Upon conviction thereof, such person shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $100 or both, with costs.

Section 8. *Breaking and Entering.* Any person who breaks into or attempts to break into any building or dwelling of any nature or other property with intent to commit any crime shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to imprisonment at labor for a period of not to exceed six (6) months or to pay a fine of not to exceed $500 or both, with costs, and may be required to make proper restitution by order of the Court.

Section 9. *Bribery.* Any person who shall give or offer to give any money, property, services or other gain or advantage to another human with corrupt intent to influence another in the discharge of his public duties or conduct and any person who shall accept, solicit or attempt to solicit any bribe as above defined, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500 or both, with costs.

Section 10. *Causing or Aiding Suicide.* Any person who shall purposely aid another to commit suicide shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 11. *Child Abuse.* Any person who shall willfully and maliciously commit acts of violence or abuse of any child under the age of eighteen (18) shall be guilty of an offense and upon conviction thereof shall be sentenced to confine-

ment for a period of not more than six (6) months and to pay a fine of not more than $500, or both, with costs.

Section 12. *Child Molestation.* Any person who shall entice, persuade, or attempt to persuade a child under the age of eighteen (18) years to enter any indecent act or any person having possession of a child under the age of eighteen (18) years in any vehicle, building, room, boat or secluded place with intent to commit an indecent act shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 13. *Communicable Diseases.* It shall be unlawful for any person infected with a communicable disease including but not limited to syphillis, gonorrhea, tuberculosis or other communicable disease dangerous to the public health, knowingly to expose another person to infection. The Court may order and compel the medical examination and treatment of any person afflicted with any such disease. Any person adjudged to be afflicted with any communicable disease of the nature specified in this section, who knowingly continues to expose others to infection, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for not more than six (6) months, or to pay a fine of not more than $500, or both, with costs.

Section 14. *Contributing to the Delinquency of a Child.* Any person who shall willfully, by an action or admission, willfully encourage or contributes to the delinquency of any child (under eighteen (18) years of age) as specified in the Juvenile Code shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than four (4) months or to pay a fine of not more than $360, or both, with costs.

Section 15. *Criminal Trespass – Buildings.* Any person who shall enter or secretly remain in any building or separately secured or occupied portion thereof, knowing that

he is not licensed or privileged to do so, whether by day or night, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than four (4) months or to pay a fine of not more than $400, or both, with costs.

Section 16. *Criminal Trespass – Lands.* Any person who shall enter or remain upon any lands including beaches or waters as to which notice against trespass is given by actual communication to such person, or by posting in a manner reasonably likely to come to the attention of intruders, or by fencing or other enclosure manifestly designed to exclude intruders, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than one (1) month or to pay a fine of not more than $100, or both, with costs, and shall be required to pay any damages ensuing from such criminal trespass.

Section 17. *Cruelty to Animals.* Any person who shall torture, mistreat, mutilate, override, or overload or deprive of food or drink, or abandon any animal which he owns of which is in his custody, or cause or procure the same, shall be guilty of an offense shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $100, or both, with costs.

Section 18. *Curfew.* Any minor who shall without parental consent be or any person who shall without good cause permit his minor children or any minor children under his care to be on the streets, highways or other public places on the Port Madison Reservation between the hours of 11:00 p.m. to 6:00 a.m. shall be guilty of an offense and upon conviction thereof, shall be sentenced to imprisonment for a period of not to exceed sixty (60) days or to pay a fine not to exceed $100, or both, with costs.

Any minor who shall violate this section shall be referred to the Juvenile Code.

Section 19. *Cutting Fence.* Any person who shall willfully cut the wire of a fence belong to another person or

the Suquamish Tribe shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $120, or both, with costs, including restitution for any property damaged.

Section 20. *Cutting Timber without a Permit.* Any person who without first securing a permit from the Suquamish Tribal Council cuts any standing green timber, including Christmas trees, on tribal land shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250, or both, with costs.

Section 21. *Desertion and Nonsupport of Children.* Any person who shall desert or willfully neglect or refuse to provide for the support or maintenance of a child of such person, including an illegitimate child or child in the lawful custody of such person, when the person is financially able to provide therefore, shall be sentenced to confinement for a period of six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 22. *Defacing Official Signs.* Any person who shall, without proper authorization, pull down or deface any sign of the Tribe, State, or Federal Government, or any advertisement authorized by law shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than fifteen (15) days or to pay a fine of not more than twenty-five ($25.00) or both, with costs, any may be required to make restitution for the damages done.

Section 23. *Destruction of Evidence.* Any person who shall willfully and knowingly destroy or withhold any evidence that could be used in the trial of a case with intent to prevent same from being used, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not to exceed sixty (60) days or to a

fine of not language to any person present or create a hazardous or physically offensive condition shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for not more than sixty (60) days or to pay a fine of not more than $150, or both, with costs.

Section 28. *Drawing or Uttering Instrument on Bank without Funds or Credit.* Any person who shall for a present consideration make or utter or deliver any check, draft, or order for payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft or order in full upon its presentation shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days and to pay a fine of not more than $100, or both, with costs, and may be required by order of the Court to make proper restitution.

Section 29. *Embezzlement.* Any person who shall, having lawful custody of property not his own, appropriate the same to his own use with intent to deprive the owner thereof, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, and to make such restitution as may be required by order of the Court. As used in this section, embezzlement shall also include the spending of minor's funds by parents or guardians for other than the purpose for which the funds were placed in the custody of the parents or guardians.

Section 30. *Escape.* Any person, who being in the lawful custody of a law enforcement officer, shall unlawfully remove himself from official detention by escape or attempt to escape, or who shall permit or assist or attempt to permit or assist another person to escape from lawful custody, or who shall fail to return to official detention following leave

granted for a specific purpose or a limited time (excluding probation, parole, or release on bail) shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 31. *Extortion.* Any person who shall willfully, by making false charges against another person or by any other means whatsoever, extort or attempt to extort any money, goods, property or anything else of value shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than (6) six months or to pay a fine of not more than $500, or both, with costs.

Section 32. *Failure to Send Children to School.* Any person who shall, without good cause, neglect or refuse to send his children or any children under his care to school, who have not reached their sixteenth (16) birthday or have not completed their eighth (8th) grade, whichever is first, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days, or to pay a fine of not more than $120, or both, with costs.

Section 33. *False Alarms.* Any person who knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, for dealing with emergencies involving danger to life and property shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $100, or both, with costs.

Section 34. *False Arrest.* Any person who shall willfully and knowingly make, or cause to be made, the unlawful arrest, detention or imprisonment of another person shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three

(3) months or to pay a fine of not more than $300, or both, with costs.

Section 35. *Failure to Support Dependent Persons.* Any person who shall, without lawful excuse, refuse or neglect to furnish food, shelter or care to those dependent upon him, under the laws, customs and usages of the Suquamish Tribe, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months, or to pay a fine of not to exceed $180, or both, with costs.

Section 36. *Fire, Failure to Control or Report.* Any person who knows that a fire is endangering life or property and fails to give a prompt fire alarm or fails to take reasonable measure to put out or control the fire without danger to himself if he knows that he is under official, contractual or other legal duty to prevent or combat the fire; or if the fire was started, lawfully or unlawfully by him or with his assent, or on property in his custody or control, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 37. *Firing Timber.* Any person who shall willfully set on fire any timber, woods, meadow, marsh, field or prairie shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 38. *Fish and Game Violation.* Any person who shall fail to comply with Fish and Game regulations adopted and promulgated by the Suquamish Tribe pursuant to the provisions of this Code or any other act, ordinance or resolutions of the Suquamish Tribe now or hereafter in force on the Port Madison Reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to

confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, and all fish or game including equipment such as fishing equipment, guns, boats, etc., used to obtain such fish and game illegally may be confiscated by the Court.

Section 39. *Flags – Desecration Thereof.* Any person who in any manner for exhibition or display shall place or cause to be placed any mark, word, or design upon, or shall publicly mutilate, defase or defile an official flag, color or ensign of the United States, the State of Washington, the Suquamish Tribe, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than ten (10) days or to pay a fine of not more than $25, or both, with costs.

Section 40. *Forgery and Counterfeiting.* Any person who shall, with intent to defraude, falsely sign, execute, alter or counterfeit any written instrument and currency shall be guilty of forgery and upon conviction thereof shall be sentenced to confinement at labor for a period of six (6) months or to pay a fine of not more than $500, or both, with costs, and may be required by order of the Court to make proper restitution.

Section 41. *Fraud.* Any person who shall by willfully misrepresentation or deceit, or by false interpreting, or by the use of false weights or measures, obtain any money or other property shall be guilty of fraud and upon conviction thereof shall be sentenced to confinement for a period of not more than two (2) months or to pay a fine of not more than $150, or both, with costs, and may be required by order of the Court to make proper restitution.

Section 42. *Gambling.* Any person who participates in any game of chance or lottery to win money or other valuable consideration or operates a place or device where a risk is taken on a chance of winning money or other valuable property without a Suquamish Tribal permit and license shall

be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than fifteen (15) days or to pay a fine of not more than $50, or both, with costs. This section shall not apply to those games or chance or lottery authorized by the Suquamish Tribal Council.

Section 43. *Indecent Exposure.* Any person who publicly exposes his sexual organ under circumstances in which his conduct is likely to cause affront or alarm, shall be guilty of an offense, and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $50, or both, with costs.

Section 44. *Injury to Public Property.* Any person who by any means whatever shall willfully or mischievously injure, destroy or deface any building or other property of the Suquamish Tribe or of the United States Government, or any other public property or deface or write upon any walls or shall insure the grounds appurtenant thereto, or the trees, fences, soil or pavement thereof shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $100, or both, with costs, and may be required by order of the Court to pay for such injury, destruction or damage.

Section 45. *Liquor Violations.* Any person who shall within the exterior boundaries of the Port Madison Reservation sell, barter, transport or manufacture any alcoholic beverage, unless possessing a legal license or permit from the Suquamish Tribal Council to do so, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 46. *Littering.* Any person who shall dispose any garbage or other forms of litter or waste anywhere within the exterior boundaries of the Port Madison Reservation,

including waterways, tidelands, public roads, except in public waste disposal grounds designated by the Suquamish Tribal Council, shall be guilty of an offense and upon conviction thereof, shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $500, or both, with costs.

Section 47. *Maintaining a Public Nuisance.* Any person who shall act in such a manner, or permit his property to fall into such condition as to injure or endanger the safety, health, comfort or property of his neighbors, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $200, or both, with costs, and may be required to remove or correct such nuisance when so ordered by the Court.

Section 48. *Malicious Mischief.* Any person who shall maliciously disturb, defase, injure or destroy any tangible property not belonging to him shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than two (2) months, or to pay a fine of not more than $100, or both, with costs, and may be required by order of the Court to make proper restitution.

Section 49. *Marijuana.* Any person who shall plant, grow, cultivate, keep for sale, sell, barter, give, have possession of or use marijuana, or any mixture or compound thereof, or any drug or derivative thereof determined by the Court harmful to the physical and mental health of the user, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 50. *Misbranding.* Any person who shall knowingly and willfully misbrand, alter or deface any brand or mark intended to designate ownership of any livestock or other property, including boats, of another person without his

consent and with the intent to deprive the owner of his property, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days and to pay a fine of not more than $200, or both, with costs.

Section 51. *Neglecting Dogs and other Animals.* Any person who shall allow a dog or other animal owned by such person or in his lawful custody roam at large or wander through populated areas, shall be guilty of an offense and upon conviction thereof shall be sentenced for a period of not more than five (5) days or to pay a fine of not more than $25, or both, with costs, provided that such dogs or animals not claimed by anyone may be disposed of by order of the Court.

Section 52. *Obstructing Justice.* Any person who with the purpose hindering the apprehension, prosecution, conviction or punishment or another for a crime, shall harbor or conceal another person, provide a weapon, transportation or other means of escape, warns the other of impending discovery, or volunteer false information to a Law Enforcement Officer, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250, or both, with costs.

Section 53. *Operating Business Without Permit.* Any person who shall engage in any business of whatever nature for profit on the Port Madison Reservation without first obtaining a business license from the Suquamish Tribal Council, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $500, or both, with costs.

Section 54. *Perjury.* Any person who shall willfully and deliberately in any judicial proceeding in any court of the Suquamish Tribe, falsely swear or interpret, or shall make a

sworn statement or affidavit knowing the same to be untrue, or shall induce to procure another person to do so, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than four (4) months or to pay a fine of not more than $300, or both, with costs.

Section 55. *Public Drunkenness; Drug Incapacitation.* Any person who shall appear in any public place under the influence of alcohol, or any other drug or narcotic, to the degree that he may endanger himself or another human or property, or annoy any persons in his vicinity, shall be sentenced to confinement for a period of not more than thirty (30) days or pay a fine of not more than $50, or both, with costs. The Court may in its judgment order the person upon conviction to participate in any available alcoholic or drug abuse program in lieu of the foregoing penalties which may be imposed upon failure of the person to follow the orders of the Court. Drunkenness alone in the absence of the other elements of this section shall not be an offense.

Section 56. *Prostitution.* Any person who shall engage in sexual activity as a business or who shall knowingly keep, maintain, rent or lease any house, room or tent or other place for the purpose of so engaging, and any person who shall procure any person to engage in such activities, or live off the earnings of any person engaged in such activities, shall be guilty of an offense and upon conviction thereof shall be sentenced for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 57. *Rape.* Any person who willfully and knowingly by force and violence rape, attempt to rape another or assists in a rape or attempted rape, or has sexual intercourse with a person under eighteen (18) years of age or a person suffering from mental defect or anyone not able to understand or control his conduct for whatever reason, shall be guilty of an offense and upon conviction thereof shall be

sentenced to confinement for a period of not to exceed six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 58. *Receiving Stolen Property.* Any person who shall receive or conceal or aid in receiving or concealing any property, knowing the same to be stolen, embezzled, or obtained by fraud or false pretense, theft, burglary or robbery, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, and may be ordered by the Court to make proper restitution.

Section 59. *Recklessly Endangering Another Person.* Any person who recklessly engages in conduct which places or may place another person being in danger of death or serious bodily injury shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of $500, or both, with costs, and may be required to furnish a satisfactory peace bond for one year.

Section 60. *Registration of Dogs.* Any person who shall fail to register and pay a registration fee of $1.00 for each calendar year for any dog owned by him or in his possession shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to confinement at labor for a period of not more than ten (10) days or to pay a fine of $25, or both, with costs. No dog will be registered unless there is produced a valid certificate of vaccination and, upon registration, all dogs shall be required to wear a registration tag. Dogs may be registered at the Tribal offices of the Suquamish Tribe or at any other station designated by the Suquamish Tribal Council. Any dog not so registered or wearing a tag attached to a collar found running at large may be picked up by the Law Enforcement Officer and disposition made thereof pursuant to order of the Court.

Section 61. *Removal of Landmarks, Navigation Markers, etc.* Any person who shall willfully remove, alter or destroy any boundary marker navigation marker or other water or landmark erected by the Suquamish Tribe of the United States Government within the limits of the Port Madison Reservation shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $50, or both, with costs.

Section 62. *Resisting Lawful Arrest.* Any person who shall willfully and knowingly, by force or violence, resist or assist another person to resist a lawful arrest shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $120, or both, with costs.

Section 63. *Refusing to Aid an Officer.* Any person who shall neglect or refuse, when called upon by any Law Enforcement Official, to assist in the arrest of any person charged or convicted of any offense or in securing such offender when apprehended, or in conveying such offender to the nearest place of confinement shall be guilty of an offense, and upon conviction shall be sentenced to confinement for a period of not more than thirty (30) days or to pay a fine of not more than $60, or both, with costs, provided that no responsibility shall attach to the person assisting the Law Enforcement Official at his request.

Section 64. *Theft.* Any person who shall take, or exercise unlawfully control over, the moveable property not his own or under his control with the purpose to deprive the owner thereof, or who lawfully transfers immovable property not his own or any interest therein with the purpose to benefit himself or another not entitled thereto shall be guilty of offense and shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250, or both, with costs, if the value of such

property is less than $50 and shall be sentenced to confinement at labor for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, if the value of the property is $50 or over. The Court may order proper restitution to be made in each case.

Section 65. *Threat or Intimidation.* Any person who, directly or indirectly, utters or addresses any threat of unlawful harm to any person with the purpose to influence his decision, opinion recommendation, vote or other exercise of discretion as a public servant or voter or to influence a public official to violate any public duty, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than three (3) months or to pay a fine of not more than $250, or both with costs.

Section 66. *Threat or Intimidation to Law Enforcement Official or Judge.* Any person who shall use unjustified force or violence, or threaten the use thereof, to a Law Enforcement Official or to a Judge of the Suquamish Tribal Court, for the purpose of interfering with or influencing the performance of an official duty, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of six (6) months or to pay a fine of not more than $500, or both, with costs.

Section 67. *Unauthorized Use of Property, including Vehicles.* Any person who shall, without property authority, use or injure any property not belonging to him, or who shall operate another's automobile, motorcycle, motor boat, or other motor-propelled vehicle without the consent of the owner shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement at labor for a period of not more than three (3) months and to pay a fine of not more than $250, or both, with costs.

Section 68. *Unlawful Assembly or Riot.* If two or more persons assemble for any unlawful purpose affecting the peace of the Port Madison Reservation or for the purpose of

committing acts of violence including destruction of property against the peace and tranquility of the Port Madison Reservation or conspire to do so, or who refuse to obey an order of a Law Enforcement Officer, each person shall be guilty of an offense and upon conviction thereof, shall be sentenced to confinement at labor for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs, and may be ordered to make proper restitution for any damages as the Court may direct. This section does not apply to any person or persons who have an approved permit to express their right of dissent and to petition for redress of grievances in a peaceful, orderly and legal manner.

Section 69. *Weapon, Carrying.* Any person who shall go about in public places armed with a dangerous weapon concealed upon his person, unless he shall have a permit signed by a Judge of the Suquamish Tribal Court or a license issued by the Suquamish Tribe, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than sixty (60) days or to pay a fine of not more than $150, or both, with costs, and such weapon shall be confiscated and disposed of in such manner as the Court may order.

Section 70. *Weapons, Firing.* Any person who fires a gun within any settled community on the Port Madison Reservation (or in any other place within the boundaries of the Port Madison Reservation with careless disregard for human life or property) shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for not more than thirty (30) days or to pay a fine of not more than $50, or both, with costs.

Section 71. *Distribution of Alcohol to the Mentally Retarded.* Any person who shall sell, barter or give any alcoholic beverage to any mentally retarded person, (or person with a mental defect or anyone not able to understand or

control his/her conduct for whatever reason) irregardless of age, shall be guilty of an offense and upon conviction thereof shall be sentenced to confinement for a period of not more than six (6) months or to pay a fine of not more than $500, or both, with costs.

ARTICLE II
SENTENCING

Section 1. *Discretion of Court.* Any confinement order of the Judge may include:

(a) Serving of sentence on weekends.

(b) Labor for public purposes while confined or in lieu thereof.

(c) Confiscation of any material substance or equipment used in wrongful and illegal acts.

ARTICLE III
POST TRIAL PROCEDURE

Section 1. *Directed Verdict.* At any time after the close of the evidence, the Court may direct a verdict of acquittal. After the charge, the jury shall retire to determine a verdict. The jury must render a verdict on every allegation in the complaint. After the verdict of the jury has been announced to the Judge, he shall discharge the jury.

Section 2. *Acquittal.* If the Court finds for the defendant or the jury brings in a verdict of not guilty on all counts of the complaint, a judgment of acquittal shall be announced by the Court and entered in the official records by the Clerk, along with the names of the jurors in the case, and the defendant shall be immediately discharged.

Section 3. *Conviction and Sentencing.* Within a reasonable time after a verdict or plea of guilty and after such

pre-sentencing investigation as the Judge may direct, the Judge shall sentence the defendant in conformity with the applicable provisions of this Code, and deliver to the Law Enforcement Officer a signed copy of the sentence. The judgment of conviction shall state the charge, the plea, the verdict and the sentence. The judgment shall be signed by the Judge and entered in the official records by the Clerk. The Judgment shall direct that the prisoner be held in custody until the prisoner has satisfied the sentence according to law.

Section 4. *Payment of Fine.* When the defendant is sentenced to pay a fine, the Court may permit payment within a definite period or by installment. In the absence of such permission, a fine shall be payable forthwith. Fines and any installment thereof shall be payable to the Clerk.

Section 5. *Motion for New Trial.* A motion for a new trial to be held in the Trial Court may be made by the defendant within seven days after judgment. The Court shall grant a motion for a new trial for the causes set forth in the Rules of the Court if such trial is required in the interest of justice.

Section 6. *Right of Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the Court shall advise the defendant of his right to appeal. All appeals shall be made in accordance with this Code.

Section 7. *Probation.* After conviction of an offense, the Court may upon such reasonable terms and conditions as it considers necessary, suspend any sentence and release the prisoner on probation. In granting probation, the Judge shall consider the prior criminal record of the prisoner, his background, character, financial conditions, family obligations and other reasonable and relevant circumstances, and other conditions as specified in the Rules of the Court.

Section 8. *Violation of Probation.* If any person shall violate his probation, he may be required to serve his original sentence plus an additional penalty for violation of his

probation, but the Court shall not revoke probation except after a hearing at which the defendant shall be present and advised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

SUQUAMISH TRIBAL COMMUNITY ORDINANCE

In order to establish land use controls for the Suquamish Indian Tribe located on the Port Madison Indian Reservation, the General Council does hereby enact the following ordinance:

Section 1. *Title and Duration*

This ordinance shall be known as the "Interim Land Development Ordinance of the Suquamish Indian Tribe for the Port Madison Indian Reservation". It shall remain in force and effect until the adoption of a master plan and comprehensive zoning ordinance, but in no event longer than eighteen (18) months.

Section 2. *Findings of Fact and Purpose*

a. *Background*: The Suquamish Tribe is located within Kitsap County. With the development of the Trident Submarine Base considerable pressure has been placed on land development within the Reservation and throughout the County. Unprecedented and rapid growth of population, housing, economic, and land development and increased utilization of natural resources has occurred during the recent past, and is expected to accelerate in the future. Faced with a number of major physical, social and fiscal problems, caused by this rapid growth in the area of the Port Madison Reservation including pressure to utilize land within the Reservation to meet those burdens caused by increased development outside of the Reservation and having concern with overall quality, density and character of land development within the Reservation, the *Suquamish Tribe has undertaken a comprehensive program to prepare a master plan to guide its future land* and *resource* development.

The Comprehensive planning program is *being accomplished by the Tribal Planner* and the *Tribal Planning*

Commission to be established *by the Suquamish Tribal Council* with the *aid of federal and Tribal funds* to review, modify, and finally present to the community and the General Council a Master Plan. The planning program will include a study and analysis of the Reservation's population, housing conditions, existing land use and proposed economic development. Technical data regarding soil, climate, water resources and drainage basins as well as other technical information will be gathered.

b. *Legislative Findings of Fact:* The Suquamish General Council hereby finds that, pending the final development and implementation of a master plan and comprehensive zoning ordinance to be in effect for a reasonable period. The Council further finds that a procedure should be established whereby variance may be made to protect against undue hardship which may be occasioned in individual cases by this ordinance.

c. *Legislative Purpose:* The purpose of this ordinance is to protect the planning process during the development of a master plan and comprehensive zoning ordinance for the Port Madison Reservation, and to insure that the existing character and use of land within the Port Madison Reservation are not altered materially pending the development of a master plan and comprehensive zoning ordinance. *Such reasonable legislation is in the best interest of the Suquamish Tribe* in that it will prevent the establishment of a pattern of land use and development which might be inconsistent with the developed master plan.

It is the *goal of the Suquamish General Council* in enacting this ordinance to *maintain the Port Madison Reservation as a social, cultural, political and economic unit for the continuing benefit and prosperity of the members of the Suquamish Indian Tribe*, while at the same time insuring that the property interests of any person not a member of the Suquamish Indian Tribe be protected, and non-member property owners are given an opportunity to participate in the development of a master plan and comprehensive zoning ordinance for the Port Madison Reservation.

Section 3. *Jurisdiction*

a. *Basis of Jurisdiction: Notwithstanding the issuance of any patent,* the *jurisdiction and governmental power of the Suquamish Indian Tribe* shall *extend to the territory within the confines of the Port Madison Reservation* as established by the Point Elliott Treaty Stat. (1885) and by executive order dated , *and to all persons* acting within the boundaries of the Reservation.

> By the Treaty of Point Elliott and United States covenanted the following:
>
> "nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent (of Indian affairs) or (Indian) agent."
>
> The Attorney General of the United States, 23 Op. Att'y Gen. 214, 217-18 (1900) has ruled that:
>
> "The legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the law of such nation. . . these nations (are fully authorized) to absolutely exclude outsiders, or to permit their residence or business upon such terms as they may choose to impose. . ."
>
> The Solicitor of the United States Department of the Interior, 55 I.D. 14, 50 (1934) has ruled that:
>
> "over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business. . ."

which principle is supported by the Supreme Court of the United States, *Morris v. Hitchcock*, 194 US 384 (1904), and by other courts.

Suquamish Indian Tribe has the sovereign power to regulate the use of lands within the exterior boundaries of the Reservation in a proper zoning and planning scheme.

b. *Persons and Property Covered by this Ordinance: This ordinance shall apply to all property located within the exterior boundaries of the Port Madison Reservation notwith-*

standing the issuance of any allotment, patent and *notwithstanding the trust status of the land involved.* This ordinance shall further *apply to all persons* who have any interest whatsoever in any real property or any appurtenance to said real property within the boundaries of the Port Madison Reservation, whether said interest is in fee or otherwise.

c. *Persons or Property Not Affected:* The provisions of this ordinance shall not apply to the development of any community facility as defined herein.

Section 4. *Definitions*

a. *Accessory Building or Use:* A building, part of a building or structure or use which is subordinate to, and the use of which is incidental to, that of the main building, structure or use of the same parcel of land.

b. *Agriculture:* The tilling of the soil, the raising of crops, horticulture, livestock farming, dairying, animal husbandry, and the use of barns, sheds and corrals in connection therewith.

c. *Business:* The sale, trade, barter or other conveyance of property, goods or services, or other activity carried on for the purpose of providing profit, gain, advantage or other benefit to the person so engaged.

d. *Commercial Development:* The clearing, grading or drilling of land and the construction, erection, placement or remodeling of any structure, addition, appurtenance or other building for the purpose of engaging in business or industry.

e. *Community Facilities: Any building, structure or parcel of land which is operated in whole or in part by the Suquamish Tribe* for the use, benefit, or economic or social development *of the Suquamish Tribe.*

f. *Dwelling:* A building or portion thereof designed exclusively for residential purposes, but not including hotels, motels, boarding houses or lodging houses.

g. *Dwelling, Multiple Family:* A detached building designed for occupancy by more than one family or by more than one unmarried individual.

h. *Dwelling, Single Family:* A detached building designed exclusively for occupancy by one family.

i. *Home Occupation:* Any occupation carried on within the dwelling or accessory building, which is clearly secondary to the main use of the premises as a dwelling. This occupation shall be carried on or conducted only by members of a family residing in the dwelling and in connection with which there is kept no stock in trade or commodity for sale upon the premises.

j. *Industry:* The construction, mining, smelting, fabricating, refining, milling or other alteration of raw materials for the purpose of selling, trading, bartering or otherwise conveying the resultant product for gain, profit or other advantage.

k. *Logging:* The cutting of stumpage, cutting into boards or otherwise removing and altering of live trees for the purpose of sale, trade, profit or other business advantage.

1. *Mobile Home:* A structure designed for human habitation which is at least 32 feet in length and 8 feet in width and which by original design is capable of being moved on public streets and highways.

m. *Mobile Home Park:* A parcel of land which has been planned and improved for the placement of mobile homes for dwelling or sleeping purposes.

n. *Recreational Use:* Camping, hiking, picnicing.

o. *Subdivision:*

a. The dividing up of any lot, parcel, tract, or section, or part thereof, of land by contract, mortgage, sale, trade, lease or other device where:

   1. The division creates 3 or more parcels or building sites of any size up to 20 acres, or

   2. 3 or more parcels or building sites of up to 20 acres are created by successive division within 18 months of the date of passage of this ordinance.

b. The division of property as set forth below shall not constitute a subdivision except that subsequent use of the property so divided shall be required to be in conformity with the provisions of this ordinance:

1. The sale of lots, parcels, tracts, or sections of land which are 20 acres or larger, or
2. The division or assigning of portions of lots, parcels, tracts, or sections of land, shown as contiguous units on the county tax rolls or Bureau of Indian Affairs records as of the date of passage of this ordinance, to any or all of the various owners or record as of the date of passage of this ordinance.

Section 5. *Prohibited Acts*

a. Unless allowed pursuant to section 7 of this ordinance, *it shall be unlawful for any person to build or cause to be built any structure of whatever* character or place or *cause to be placed any mobile home upon any land within the boundaries of the Port Madison Reservation,* or to *modify or cause to be modified any existing structure or mobile home* located upon lands within the boundaries of the Port Madision Reservation, or to divide, subdivide, plat or otherwise attempt to modify or otherwise change any existing parcel of land located within the boundaries of the Port Madision Reservation for the purpose of sale or building thereon, or engage in development, construction or modification of any existing mobile home park, *or engage in any industry not now presently in operation*, nor shall any person engage in any logging operation, land clearing, or other activity modifying or affecting the topography of any land located within the Port Madison Reservation.

b. To avoid undue hardship, nothing in this ordinance shall be deemed to require a change in plans, construction or designated use of any building on which actual construction has lawfully begun prior to the emergency enactment of this ordinance, and upon which the actual building construction has been diligently carried on. Actual building construction is hereby defined to mean the placing of construction materials to permanent position and fastened in a permanent manner.

c. Any land within the boundaries of the Port Madison Reservation may continue to be used for any purpose that the land is presently committed to, including the use and occupancy of any structure, thereon, *provided*, nothing in this

subsection shall authorize any of the acts prohibited in section 5a above without first complying with section 7 below.

d. Nothing in this ordinance is designed to create or determine the use of any structure or property which may be considered non-conforming under the Master Plan and Comprehensive Zoning Ordinance.

Section 7. *Variance*

The Suquamish General Council shall have the power to *vary the application of any provision of this ordinance upon its determination*, in its legislative discretion, that, the granting of such variance is consistent with the spirit of the development master plan for the Port Madision Reservation and with the health, safety, morals and general welfare of the community.

a. Applications for variance

1. *Applications for a variance shall be submitted to the Tribal Council* and shall include the following information concerning the property for which the application is being made:

(a) Type of use proposed
(b) A description and detailed plan of any anticipated construction on said property or currently owned adjacent property
(c) Topographical contours
(d) Access right of way
(e) Utility lines and easements
(f) Solid waste disposal methods
(g) Sewage disposal methods
(h) Analysis of traffic patterns
(i) Landscape plan
(j) Phasing or timing of the project
(k) List of restrictive covenants (if any) concerning quality of private structure and landscape to be erected

(l) Water supply provisions

(m) Fire and police protection

(n) Road standards to be used for drives and roads

(o) List of deviations from normal requirements of the ordinance

(p) Legal description of property

(q) Name and address of legal owner

(r) Name and address of person submitting application

(s) Any other relevant data requested by the Tribal Council or the Planning Committee

2. *The Suquamish Tribal Council shall refer such application to a Hearing Officer appointed by the Suquamish Tribe* for the development of an initial recommendation to the Tribal Council to either grant or deny the variance. An application for variance shall be forwarded to the Hearing Officer within forty-eight (48) hours of its receipt in the office of the Tribal Council.

b. Procedures before Hearing Officer

1. Upon referral of an application for a variance from the Tribal Council to the Hearing Officer, the Hearing Officer shall cause notice of the pending application to be published in a newspaper of general circulation within the Port Madision Reservation and shall further cause notice to be posted at locations within the Port Madision Reservation. If the Hearing Officer has determined to hold a hearing on the application for a variance the notice provided in this section shall detail the time and location of said hearing.

2. The Hearing Officer may hold hearings, call witnesses or request the submission of any other material considered relevant to a determination of an application for a variance. The Hearing Officer shall hold a hearing when requested by an applicant or other interested person. Notice of all scheduled hearings shall be posted at locations within the Port Madision Reservation at least ten (10) days prior to any scheduled hearing. The Hearing Officer shall determine the rules of procedure to be followed at hearings provided by this section.

3. The Hearing Officer shall prepare a report and deliver it to the General Council within sixty (60) days of receiving the application for variance. The report shall detail the material considered by the Hearing Officer, whether a hearing was held, and shall note the basis of any recommendation contained therein.

c. Procedures Before General Council

1. *The General Council* shall either *grant or deny* the variance within thirty (30) days of receipt of the report of the Hearing Officer. The General Council shall consider a pending application based upon the record and finding made before the Hearing Officer. The *General Council may*, within its discretion receive additional written or oral testimony, and may, but need not hold an additional hearing prior to making a final decision. If the General Council elects to receive additional testimony, it may delay a final decision for an additional thirty (30) days. The General Council may issue a variance subject to any limitations or conditions found appropriate by the General Council.

2. Within ten (10) days of its decision, the General Council shall send a certified letter to the applicant indicating the decision, the grounds for the decision and the *procedure for petitioning for review of an unfavorable decision to the Suquamish General Court.*

d. Appeal

1. *The Suquamish Tribal Court shall have exclusive jurisdiction to review the denial of a variance.* A petition for review shall be filed with the Tribal Court within ten (10) days of receipt of the decision from the General Council, a copy served upon the Tribal Council within five (5) days thereafter.

2. The *Suquamish Tribal Court* when reviewing the denial of a variance shall consider only whether the action of the General Council was clearly erroneous and wholly without a factual basis such as to be a denial of due process, and shall reverse the action of the Tribal Council only when the Tribal Court so finds by clear, congent and convincing evidence.

Section 8. *Limitation on the Tribal Court and Hearing Officer under this Ordinance*

Whenever the Tribal Court or a Hearing Officer takes any action, or performs any function pursuant to this Ordinance each body shall comply with the following provisions:

a. No Judge or Judge pro tem of the Suquamish Tribal Court shall participate in the review of a denial of a variance issued by the Suquamish Tribal Council when the petitioner is related to the Tribal Judge by blood or marriage within six degrees of kinship as computed by the civil law system. In those situations where the Tribal judge is not qualified under the terms of this section the Tribal judge shall disqualify his or herself. Where no Tribal judge of the Suquamish Tribal Court is qualified under this ordinance to hear a particular case, the Chief Judge shall contact the judges of the Tribal court of another Indian tribe, and shall procure from said tribal court a judge to act as a judge pro tem in the specific case.

b. The Hearing Office or Hearing Officer pro tem provided under the Ordinance shall not participate in any manner in the determination of an application for a variance where the applicant is related to the Hearing Office or Hearing Officer pro tem by blood or marriage within six degrees of kinship as computed by the civil law system. In those cases where the Hearing Officer is disqualified under the terms of this section the Tribal Council shall select a Hearing Officer Pro Tem to make recommendations on a specific case.

Section 9. *Adoption*

This ordinance shall become effective upon completion of the following procedure:

a) *The Ordinance shall be presented to a General Council Meeting for its initial approval.*

b) If approved by the General Council this Ordinance shall be presented to a public hearing to be held at a permanent place within the reservation to receive comments, proposed changes or other information relevant to whether this ordinance should be adopted. Any person, group or

corporation may present testimony relating to this ordinance. At least ten (10) days notice shall be provided for said public hearing.

c) *Within ten (10) days following the public hearing held pursuant to Section 8 (b) above, the Suquamish General Council shall meet and either adopt or not adopt this ordinance.* The General Council may after considering the comments and other material received at the public hearing amend this ordinance and adopt said ordinance in its amended form.

Section 10. *Violation*

a. *The Suquamish Tribal Court shall have exclusive jurisdiction to hear and determine any matter arising under this ordinance.*

b. It shall be *unlawful* for any person, corporation, or other entity to *violate any provision of this ordinance. Any person, corporation, or other entity found guilty of violating any provision of this ordinance shall be fined not more than $500* or *sentenced up to six (6) months in jail or both.*

c. The Suquamish Tribe, any person, corporation or other entity may bring an action in the Suquamish Tribal Court to halt, abate or modify the construction of any building, structure or use of real property within the Port Madison Reservation which is in violation of any provision of this ordinance. Any such action may in addition seek damages, and or restoration of the property. The Suquamish Tribal Court may in addition award to the prevailing party a reasonable attorneys fee.

d. Nothing in this ordinance shall be deemed as a waiver of the *sovereign immunity of the Suquamish Tribe authorizing suit against the Tribe in any court other than the Suquamish Tribal Court*, nor shall it be deemed as authorizing a suit for damages against the Suquamish Tribe for any action arising under this ordinance, unless the Suquamish Tribal Council by specific legislative action should authorize such an action for damages.

Section 11. *Severability*

Should any word, section, clause, paragraph, sentence or provision of this ordinance be declared invalid by a court of

competent jurisdiction, such decision shall not affect the validity of any other part of this ordinance which can be given effect without such invalid part or parts.

(Emphasis added)

SUQUAMISH TRIBAL RESOLUTIONS, GUBERNATORIAL PROCLAMATIONS, AND THE SECRETARY OF INTERIOR'S ACCEPTANCE OF RETROCESSION

(1) April 29, 1958 Resolution of Suquamish Tribe asking governor to assume jurisdiction over Port Madison Reservation.

"RESOLUTION OF THE SUQUAMISH TRIBE OF THE PORT MADISON RESERVATION

WHEREAS, Under Public Law 280, the United States has granted to the State of Washington authority to assume criminal and civil jurisdiction over the peoples residing upon Indian reservations within the State of Washington, and;

WHEREAS, the Legislature of the State of Washington, in Chapter 240, Laws of 1957, has bound and obligated the State of Washington to assume such jurisdiction at such time as the people of said reservations, through their proper governing authority shall request the State of Washington to assume such jurisdiction, and;

WHEREAS, the Suquamish Tribe of the Port Madison Reservation is an organized Indian Tribe, and the Suquamish Tribal Council is the recognized governing body of the said Tribe, and;

WHEREAS, the Suquamish Indian people have found the laws of the United States, as applied to Indian territory, and Tribal laws, insofar as such can be effectively enforced, to be inadequate for the protection of the Suquamish Indian people, and they therefore desire that the State of Washington assume criminal and civil jurisdiction over peoples residing upon their reservation and territory, now therefore,

IT IS RESOLVED that the Suquamish Tribal Council hereby requests and expresses its desire that the criminal and civil jurisdiction of the State of Washington be extended to include the prople of the Suquamish Indian Tribe and all persons being and residing upon the Port Madison Indian Reservation, the same being located in Kitsap County, Washington, particularly described as follows:

Established by Treaty of January 22, 1855. Description: Lot 5, 6, 7, E 1/2 E 1/2 Section 9; all lands in Sections 10, 11, 12, 13, 14, 15, 19, 20, 21, 29, 30, 31, 32; S 1/2 Sections 16, 17, 18; Lots 1, 2, 3, Section 16, T. 26 N., R. 2 E., W. M., and Lot 1, Section 6, T. 25 N., R. 2 E., W.M.

And the chairman of the Tribal Council is directed to transmit to the governor of the State of Washington, on behalf of the Tribal Council and the people of the Suquamish Indian Tribe, a true copy of this resolution.

Dated this 29 day of April, 1958.

CERTIFICATION

The above resolution of the Suquamish Tribal Council requesting that the State of Washington assume criminal and civil jurisdiction over persons residing and being upon the Port Madison Indian Reservation, located in Kitsap County, Washington, was duly adopted at a special meeting of the Suquamish Council on the 19th day of December, 1957 by a vote of 21 members for the said resolution and 0 members against the said resolution; and there were present at the said meeting 21 members of which number 15 or more constitute a quorum.

Suquamish Tribal Council

/s/ Charles R. Lawrence
Chairman

/s/ Grace Sigo
Secretary

Approved: May 5, 1958

/s/ M. F. Schwartz
ACTING Superintendent
Western Washington Indian Agency"

(2) May 5, 1958, Letter of Request from Suquamish Tribe to Governor Rossellini for Washington to assume jurisdiction.

"Suquamish, Washington
May 5, 1958

The Honorable Albert D. Rossellini
Governor of Washington
Capitol Building
Olympia, Washington

My Dear Governor Rossellini:

I am transmitting to you a duly adopted resolution of the Suquamish Tribe of Indians of the Port Madison Reservation enacted April 29, 1958, requesting that the State of Washington assume criminal and civil jurisdiction over all of the peoples being and residing on the Port Madison Reservation.

The members of the Suquamish Indian Tribe appreciate this opportunity of requesting this service and respectfully request that you issue the necessary proclamation as soon as possible.

Sincerely yours,
/s/ Charles R. Lawrence
Chairman
Suquamish Tribal Council"

Enclosure

(3) May 15, 1958, Proclamation of Governor Rosellini proclaiming and declaring criminal and civil jurisdiction per (1), (2) and (3) above (Sec. 2, Laws of 1957)

"A PROCLAMATION BY THE GOVERNOR:

WHEREAS, the Suquamish Tribal Council has duly filed with the Governor of the State of Washington a resolution expressing the desire of the suquamish Indian Tribe that its people and lands be subject to the criminal and civil jurisdiction of the State of Washington:

NOW, THEREFORE, I, Albert D. Rosellini, Governor of the State of Washington, by virtue of the

authority in me vested under chapter 240, Laws of 1957, hereby proclaim and declare: That effective July 14, 1958,

The criminal and civil jurisdiction of the State of Washington shall apply to the Suquamish Indian people, their reservation, territory, lands and country, and all persons being and residing therein.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the State of Washington to be affixed at Olympia this fifteenth day of May, A. D., nineteen hundred and fifty-eight.

/s/ Albert D. Rossellini
Governor of Washington

BY THE GOVERNOR:

/s/ Ray J. Yeoman
Assistant Secretary of State"

(4) Jan. 11, 1971, Resolution of Suquamish Tribe per vote of 29 members, declaring intent to return jurisdiction to United States and retain concurrent jurisdiction.

"RESOLUTION OF THE SUQUAMISH TRIBE OF PORT MADISON INDIAN RESERVATION

Whereas, under Public Law 280, the United States of America has granted to the State of Washington authority to assume criminal and civil jurisdiction over the people residing upon Indian Reservations within the State of Washington and

Whereas, the legislature of the State of Washington in Chapter 240, laws of 1957 has bound and obligated the State of Washington to assume such jurisdiction at such time as the people of said reservations, through their proper governing authority shall request the State of Washington to assume such jurisdiction and,

Whereas, the SUQUAMISH Indian people have found that serious confusion exists on jurisdiction of law and order between State and Federal officials concerning law and order on this PORT MADISON INDIAN RESERVATION.

We, the people of PORT MADISON RESERVATION, do hereby make official our intention to return jurisdiction to the United States Government in matters of Law and Order.

As of this date, 11 January, 1971.

Be it further resolved that any legislation of this subject adhere to the following principles:

First:

No jurisdiction be imposed without consent of the tribes involved.

Second:

Tribal government to retain concurrent jurisdiction to the fullest possible extent.

CERTIFICATION

The above Resolution of the SUQUAMISH TRIBE requesting to the State of Washington to relinguish its right to criminal and civil jurisdiction over persons residing and being upon the PORT MADISON INDIAN RESERVATION, located in KITSAP COUNTY, WASHINGTON, was duly adopted at a special meeting of the SUQUAMISH TRIBE on the 10th day of January, 1971. By a vote of 29 members for the said resolution and 0 members against the said resolution.

/s/ Grace Duggan
GRACE DUGGAN
CHAIRMAN, SUQUAMISH TRIBAL COUNCIL

/s/ Evelyn C. Hughes
EVELYN C. HUGHES
SECRETARY, SUQUAMISH TRIBAL COUNCIL"

(5) August 26, 1971, Proclamation of Governor Evans, proclaiming Proclamation of Governor Rosellini null and void and retroceding jurisdiction to United States EXCEPT AS PROVIDED UNDER CHAPTER 36, LAWS OF 1964 (RCW 37.12.010 - 37.12.060, 5 and 6 HEREOF)

"A PROCLAMATION BY THE GOVERNOR:

WHEREAS, on the 15th day of May, 1958, a Proclamation was issued by Governor Rosellini of the State of Washington, proclaiming that "The criminal and civil jurisdiction of the State of Washington shall apply to the Suquamish Indian people, their reservation, territory, lands and country, and all persons being and residing therein"; and

WHEREAS, that Proclamation was issued under the provisions of Chapter 240, Laws of 1957, enacted pursuant to the authority granted the State of Washington by Public Law 280, 67 Stat. 588 (1953) which authorized the extension of law and order to any Indian reservation in the State of Washington when requested by the governing body of the tribe thereof; and

WHEREAS, under the provision of Chapter 36, Laws of 1963, the State of Washington assumed criminal and civil jurisdiction over certain specific matters on all reservations in the state whether requested by the tribes concerned or not; and

WHEREAS, subsequent to the Proclamation of May 15, 1958, the Suquamish Indian people have been confused as to the appropriate jurisdiction for criminal and civil matters between State and Federal officials; and

WHEREAS, on January 11, 1971, the Suquamish Tribe adopted a Resolution expressing their "intention to return jurisdiction to the United States Government in matters of Law and Order," which Resolution was received by me on March 15, 1971;

NOW, THEREFORE, I, Daniel J. Evans, Governor of the State of Washington, do hereby proclaim that Governor Rosellini's Proclamation of the 15th day of May, 1958, proclaiming state jurisdiction over the Suquamish, is hereby revoked and proclaimed null and void.

IT IS FURTHER PROCLAIMED, that any jurisdiction exercised by the State of Washington over the Suquamish Port Madison Indian Reservation except as provided under Chapter 36, Laws of 1963 (RCW 37.12.010-37.12.060), is retroceded to the United States.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the State of Washington to be affixed at Olympia, this 26th day of August, 1971.

/s/ Daniel J. Evans
Governor of Washington"

(6) April 5, 1972, Secretary of Interior of U.S. Notice of Acceptance of Retrocession as offered on August 26, 1971, proclamation of Governor Evans, EXCEPT AS PROVIDED UNDER CHAPTER 36, LAWS OF 1963 (RCW 37.12.010 - 37.12.060 5 and 6 HEREOF)

"Office of the Secretary

PORT MADISON INDIAN RESERVATION

Notice of Acceptance of Retrocession of Jurisdiction

Pursuant to the authority vested in the Secretary of the Interior by executive Order No. 11435 (33 F.R. 17339), I hereby accept as of 12:01 a.m., e.s.t., of the day following publication of this notice in the FEDERAL REGISTER, retrocession to the United States of all jurisdiction exercised by the State of Washington over the Port Madison Indian Reservation, except as provided under Chapter 35, Laws of 1963 (RCW 37.12.010 - 37.12.060), as offered on August 26, 1971, by proclamation of the Governor of Washington.

HARRISON LOESCH,
Assistant Secretary
of the Interior.

April 5, 1972

- - - - - - - - - - - - - - -

37 F.R. 7353 - THURSDAY, APRIL 13, 1972"

(7) THE SUQUAMISH TRIBE PORT MADISON INDIAN RESERVATION RESOLUTION NO. 77-065

WHEREAS the Suquamish General Council is the duly constituted governing body of the Port Madision Indian Reservation by authority of the Constitution and By-Laws for the Suquamish Indian Tribe of the Port Madision Indian Reservation as approved July 2, 1965, by the Under-Secretary of the Interior; and,

WHEREAS under the Constitution and By-Laws of the Tribe, the Suquamish Tribal Council is charged with the duty of protecting the health, security and general welfare of the Suquamish Tribe and all Reservation Residents; and,

WHEREAS the Suquamish General Council recognizes the need to establish procedures for the selection of jurors for the Suquamish Tribal Court System; and,

WHEREAS the Suquamish General Council desires that all Tribal members participate in the judicial process; and,

WHEREAS membership in the Suquamish Tribe is a prerequisite to participate in the jury process,

NOW THEREFORE BE IT RESOLVED, that the Suquamish General Council amends the existing Law and Order Code to all Suquamish Tribal members, regardless of residence, to serve as jurors in the Suquamish Tribal Court and to establish that only Suquamish Tribal Members are eligible to serve as jurors in the Suquamish Tribal Court System.

CERTIFICATION

The foregoing resolution was duly enacted by the Suquamish General Council Meeting this twelfth day of June, 1977, by a vote of 32 FOR and 0 AGAINST. (1 abstention)

BY: /s/ Marilyn A. George
/s/ Marion Boushie

ATTEST:
/s/ Lawrence A. Webster

Marilyn George (date) or Lawrence Webster (date)
Marion Boushie (date)

REGULATIONS OF THE SECRETARY OF INTERIOR CODIFIED IN TITLE 25 OF THE CODE OF FEDERAL REGULATIONS 1973

(1) §11.1 *Application of regulations*

(d) The regulations in this part shall continue to apply to tribes organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

(e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to the individual tribe, and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.

(2) §11.2 *Jurisdiction*

(a) A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in §§ 11.38-11.87NH, when committed by any Indian, within the reservation or reservations for which the court is established, * * *

(3) §52.7 *Adoption*

A constitution and bylaws or amendment shall be considered adopted if a majority of those actually voting vote in favor of adoption provided the total vote cast is not less than 30 percent of those entitled to vote; but no action shall become effective until it is approved by the Secretary.

Supreme Court, U. S.
FILED
NOV 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al,*
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al,*
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

Oliphant v. Suquamish Indian Tribe, et al.[1] The opinion of the Ninth Circuit Court of Appeals is reported at 544 F.2d 1007 (1976).[2] The memorandum opinion of the District Court for the Western District of Washington is unreported.[3]

1. In the Ninth Circuit, this case was captioned *Oliphant v. Schlie, et al.* It shall hereinafter be referred to as *Oliphant*.

2. That opinion is set forth in the Appendix at 55-64. The dissent thereto is set forth in the Appendix at 65-73. All references in this brief to the Appendix refer to the printed Appendix filed with this Court on August 8, 1977, pursuant to Rules 17 and 36.

3. That opinion is set forth in the Appendix at 48-52.

Belgarde v. Suquamish Indian Tribe, et al.[4] There is no Ninth Circuit Court of Appeals opinion in this case, since this Court granted certiorari before judgment in the Ninth Circuit.[5] The Order Denying Writ of Habeas Corpus of the District Court for the Western District of Washington and the Report and Recommendation of United States Magistrate adopted by the District Court are unreported.[3]

JURISDICTION

In *Oliphant*, the judgment of the Ninth Circuit Court of Appeals was entered on August 24, 1976, (Appendix at 55).

In *Belgarde*, the judgment of the District Court for the Western District of Washington was entered on August 22, 1975, (Appendix at 124). Notice of Appeal to the Ninth Circuit was filed September 4, 1975, (Appendix at 125).

The joint Petition for Writ of Certiorari was filed November 22, 1976, and was granted June 13, 1977, (Appendix at 129). The jurisdiction of this Court in *Oliphant* rests on 28 U.S.C. §1254(1), and in *Belgarde* on 28 U.S.C. §1254(1) and Rule 20 of this Court.

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4. In the District Court, this case was captioned *Belgarde v. Morton et al.* It shall hereinafter be referred to as *Belgarde*.

5. In fact, certiorari was granted prior to the submission of briefs or occurrence of oral argument in the Ninth Circuit. The parties had stipulated that the Ninth Circuit's proceedings in *Belgarde* be held abeyance pending the Ninth Circuit's decision in *Oliphant* (Appendix at 126-27). Based on that stipulation, the Ninth Circuit so ordered (Appendix at 128). Subsequent to the Ninth Circuit's decision in *Oliphant*, Belgarde moved that the Ninth Circuit stay further proceedings in this case pending disposition of the Petition for Writ of Certiorari to this Court. The Ninth Circuit then entered a 35 day stay order. Well after the expiration of that stay order, but prior to the occurrence of any further Ninth Circuit proceedings in *Belgarde*, this Court granted certiorari.

6. The District Court Order and Magistrate Report are set forth in the Appendix at 122-23 and 110-21, respectively.

QUESTION PRESENTED

Petitioners, non-Indians, were charged in Suquamish Tribal Court with committing minor offenses under the Tribal Code against the personnel and property of the Tribe. The alleged offenses took place on the Port Madison Indian Reservation, which has been set aside for the exclusive use and occupancy of the Suquamish Tribe:

> Does the Tribal Court have jurisdiction over Petitioners' alleged offenses?

TREATIES, STATUTES, AND ORDINANCES INVOLVED

Treaty of Point Elliott, 1855, 12 Stat. 927, (Set out at 6a-7a of the Appendix to Brief for Petitioners, hereinafter referred to as App. Pet. Brief).

1934 Indian Reorganization Act §16, 25 U.S.C. §476 (App. Pet. Brief at 16a).

18 U.S.C. §1152 (1970) (App. Pet. Brief at 14a-15a).

Public Law 83-280, §§6, 7, 67 Stat. 588 (1953) (App. Pet. Brief at 17a).

1968 Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. §1302 (App. Pet. Brief at 17a-18a).

Revised Code of Washington §37.12.010 (App. Pet. Brief at 20a).

Constitution and By-Laws of the Suquamish Indian Tribe (July 2, 1965) (App. Pet. Brief at 4a-6a).

Law and Order Code of the Suquamish Indian Tribe (1973) (App. Pet. Brief at 21a-47a).

STATEMENT

Respondents adopt as their own the Statement set out in the Brief for the United States as Amicus Curiae at 2-8.[7]

The record[8] discloses that there were 550 members of the Suquamish Tribe at the time of the events in issue. Approximately 150 of those members lived on the Port

7. However, two matters in that Statement, although ancillary to this case, should be corrected: (1) All allotted lands on the Port Madison Reservation, whether held in trust or for which fee patents have been issued, were specifically allotted under Article VII of the Treaty of Point Elliott, 1855, 12 Stat. 927, and *not* (as the Brief for United States at 4 states) under the General Allotment Act of 1887, 24 Stat. 388. (2) The Agreement of 1904, ratified by Congress in 1905, 33 Stat. 1078, did *not* (as the Brief for United States at 3 n.2 states) diminish the Port Madison Indian Reservation. Under the Agreement the involved 48 acres were not opened to public settlement but rather simply purchased by the United States for use specifically as a military installation.

8. Amicus Kitsap County apparently feels unconstrained by the applicable rules of appellate procedure regarding the factual record on appeal. Disregarding the rule that an appellate court has properly before it only those adjudicative facts contained within the record on appeal, Kitsap County attempts (Brief for Amicus Curiae Kitsap County at 2-20 and 1a-5a) to "supplement" that record in wholesale fashion on the asserted basis that this is done to provide this Court with a "complete picture" (*Id.* at 3) of allegedly relevant adjudicative facts. Perhaps the most outrageous example of this is the effort to inject into the record new "evidence" regarding the very facts of Petitioner Belgarde's arrest (*Id.* at 11-12). In point of fact Kitsap County's Statement of the Case (*Id.* at 2-20) is *rife* with instances of similarly improper allegations, many of which are misleading or grossly inaccurate and others of which are wholly irrelevant. In light of this, Respondents feel no obligation to rebut *specifically* this material. Furthermore, it is submitted that the most appropriate response would be for this Court to strike the involved portions of the Brief for Amicus Curiae Kitsap County, which appear therein at 2-20 and 1a-5a.

Officials of Kitsap County, including the Prosecuting Attorney, were in fact well aware of both *Oliphant* and *Belgarde* during the many months in which each was under consideration in the District Court. However, they made no attempt during that time to bring *any* factual material before the District Court. Therefore, there would be no element of inequity in this Court's striking this material. On the other hand, substantial inequity would result if this Court in any way relied on this improper material, since the record made below has with full justification been relied on by not only the parties hereto, but also the District Court and Court of Appeals below.

Madison Reservation. The remaining members lived in nearby communities which afforded better employment opportunities. In addition, 50 Indians with other tribal affiliations lived on the Reservation. (Supp. R. 119 and 154).

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present only a narrow question regarding the legal authority of a particular Indian tribe, in the setting of a particular fact situation. Therefore, although Petitioners ~~Respondents~~ would have this Court believe that it must determine here whether *all* Indian tribes possess *full* criminal jurisdiction over non-Indians on the reservation as to *all manner* of criminal offenses, this is indeed not the case. In point of fact, these cases only involve: the Suquamish Indian Tribe, which is shown to have a unique treaty history bearing vitally on the issue presented; minor criminal offenses; moreover, offenses directly assaultive against the Tribe's personnel and property; and a record of unresponsiveness of other law enforcement personnel—county and federal—both generally and as to Petitioners' alleged offenses particularly.

Furthermore, the Tribe is *not* contending that the criminal jurisdiction it exercised in these cases is exclusive. Rather, it maintains that this jurisdiction is *concurrent* with any other operative criminal jurisdiction—whether federal or state (if in fact state jurisdiction actually exists under Public Law 83-280).

In addition, the tribal court in which Petitioners were charged is *not* a Bureau of Indian Affairs Court of Indian Offenses. Therefore, the judicial and regulatory restric-

tions on such administrative courts have no relevance in these cases. Rather, Petitioners were charged in the Suquamish Tribal Court, a creation of the Tribe itself, with powers flowing directly from the Tribe.

Finally, Petitioners do not here attack the criminal *procedures* followed in these cases by the Tribal Court and Tribal police. They attack only the jurisdictional base for those procedures.

Petitioners (and the dissent in the Ninth Circuit) argue that Indian tribes have generally not exercised criminal jurisdiction over non-Indians over the last 100 years, and that that inactivity is legally relevant to these cases. But, there are two broad answers to this contention.

First, there is no legal basis for the argument. Tribal power does not cease to exist merely because a tribe over a long period of time chooses, for whatever reason, not to assert the power.[9]

Second, the real reasons for tribal disuse of this jurisdictional power are not legal but historical and sociopolitical. As this Court has noted, over the last century the Bureau of Indian Affairs has exercised "plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes."[10] As a result, Indians have suffered. "The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests."[11] It created a sense of despair and impotence among the tribes. People so indoctrinated do not aggressively assert the full measure of their rights. In the

9. Department of the Interior, *Federal Indian Law*, 402 (1958).
10. *Morton v. Mancari*, 417 U.S. 535, 542 (1974).
11. *Id.* at 553.

area of criminal jurisdiction, this sense of powerlessness was aggravated by a federal policy discouraging tribal assertion of jurisdiction over non-Indians.[12]

However, Indian tribes now have a dramatically different and positive point of view. This is a product of an enlightened federal policy, which commenced in the mid-1960's and continues through the present date, which encourages Indian tribes to take responsibility for their affairs and the governance of their reservations. A reassertion of dormant tribal powers, such as that involved in these cases, has been both a natural and federally-intended result.

In addition, the assertion of tribal criminal jurisdiction over non-Indians has been *necessary*. This is confirmed by the law enforcement vacuum revealed by the record in these cases, and by reservation law enforcement conditions described in the briefs of amici supporting Respondents.

Interestingly, as indicated in those briefs of amici, in recent years tribal law enforcement has been both vigorous and extensive against both Indians and non-Indians. The dearth of federal litigation arising from that tribal law enforcement is, therefore, quite remarkable. It is also instructive. Clearly, the paucity of litigative challenge to, or criticism of, tribal law enforcement confirms that it is both sound and essential.

Congress has recently set about purposefully dealing with these matters. Under Public Law 93-580,[13] the Ameri-

12. Two noted commentators, both of whom conclude that the federal law does not deprive Indian tribes of jurisdiction over non-Indians, have averted to this policy. Price, *Law and the American Indian*, 172, 173 (1973); Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 558 (1976).
13. 88 Stat. 1910 (1975).

can Indian Policy Review Commission was established to conduct a comprehensive review of the historical and legal developments underlying the Indians' relationship with the federal government and to make recommendations for the revision of existing law and policy. The Final Report of the Congressional Commission, submitted to Congress in May, 1977, is a thorough and revealing review of these issues.

The issue at hand was thoroughly studied by the Commission, with the following conclusions (Final Report at 154):

> There is an established legal basis for tribes to exercise jurisdiction over non-Indians.
>
> There has been a demonstrated need for the exercise of some tribal jurisdiction over non-Indians within Indian reservations.

Respondents are therefore aware that, in the final analysis, the nature and scope of tribal criminal jurisdiction are perpetually subject to change by congressional action. Indeed, the Final Report of the American Indian Policy Review Commission may precipitate such action. However, these cases, of course, turn on the law as it presently exists, which, Respondents will show, was properly interpreted by the courts below.

Respondents contend that the Suquamish Indian Tribe properly exercised jurisdiction over the offenses allegedly committed by Petitioners. In support of this contention, Respondents make the following argument:

(1) Indian tribes possessed, in the first instance, the full sovereign powers of any nation. Upon entering into treaties with the United States, certain of these powers, in particular the international powers, were qualified, but

the tribes retain all of their domestic powers which have not been taken away by treaty or by express statute. Support for this proposition is shown in a continuum of the cases of this Court spanning 150 years. Therefore, all treaties and statutes affecting the powers of the Suquamish Tribe must be examined.

(2) The early treaties and statutes establishing the relationship between Indian tribes and the United States recognized tribal authority over non-Indians as one of these inherent tribal powers. And, the 1834 Trade and Intercourse Act, predecessor to the present general federal crimes statute (18 U.S.C. §1152), did not extinguish that tribal jurisdiction, which continued concurrent with federal jurisdiction. In fact, the legislative history of the 1834 Act confirms this continuing tribal jurisdiction over the activities of non-Indians on reservations. Analysis of some important post-1834 statutes and treaties further confirms the continuance of this jurisdiction. Finally, Petitioners' authorities cited for the proposition that tribal jurisdiction does not extend to non-Indians are rebutted.

(3) The facts and circumstances surrounding the execution of the Treaty of Point Elliott (the Suquamish treaty), are thoroughly analyzed. The proposed draft treaty would have expressly terminated tribal authority over non-Indians. However, the provisions proposed to accomplish this were the *only* draft provisions not incorporated into the final treaty. This analysis conclusively rebuts the assertion that the Suquamish Indian Tribe surrendered such authority by treaty.

(4) Early and recent cases confirming tribal authority over the activities of non-Indians are identified. In addition,

recent decisions of this Court are relied upon to show that neither the non-Indian identity of the party, nor the non-trust status of the involved land, are relevant to the reach of tribal jurisdiction. Finally, a proposed jurisdiction standard—termed "tribal subject matter jurisdiction"—is presented. Under this standard, a tribe possesses jurisdiction over those on-reservation activities of non-Indians as to which there is a "sufficient tribal interest." Decisions of this Court in analogous areas are brought forth in support of this proposed jurisdiction standard.

(5) Two federal statutes stand as a statutory confirmation of tribal power over the activities of non-Indians. In particular:

a. The Indian Reorganization Act of 1934. Its purposes confirm the tribal power, as does an authoritative opinion of the Solicitor of the Department of the Interior issued upon enactment of the Act; and

b. The Indian Civil Rights Act of 1968. Its terms and legislative history confirm the tribal power.

(6) Respondents' position is consonant with the declared federal Indian policy, which strongly supports tribal assumption of governmental authority over the reservation. Furthermore, the law enforcement conditions on the Port Madison Reservation confirm the soundness of this dynamic federal Indian policy.

(7) Petitioners' contention that jurisdiction over their offenses rests *exclusively* with State of Washington is rejected. First, the claim of state jurisdiction under Public Law 83-280 is shown to be invalid because of a failure to effect a federally-required amendment of the State Constitution. Second, Port Madison is shown to be, at most, a "partial" state jurisdiction reservation because of retrocession by the State of the initially assumed "total" jurisdiction. Third, the partial jurisdiction is in any event invalid because it is either not permitted by Public Law 83-280 or a denial of equal protection of the laws. Fourth, if the State has partial jurisdiction, it would cover Petitioner Belgarde only. In conclusion, *any* state jurisdiction over the Petitioners based on Public Law 83-280 is *concurrent* with that of the Tribe.

ARGUMENT

1. The Suquamish Tribe Possesses Those Inherent Governmental Powers Not Expressly Extinguished By Treaty or Statute.

The jurisdiction of the Suquamish Indian Tribe at issue in these cases derives principally from the Tribe's retained inherent powers of government over the Port Madison Indian Reservation. More particularly, the Tribe asserts that—as a continuing attribute of its political authority over the Reservation—it may by appropriate means regulate non-Indian conduct occurring on the Reservation and affecting essential Tribal interests. Finally, it is the Tribe's position that under this authority it may prosecute non-Indians alleged to have committed on-Reservation minor offenses under the Tribal code against the Tribe's personnel and property.

Analytically, Respondents will proceed fundamentally on the basis of the following cardinal principle of federal Indian law:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed,

> in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the Tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.

Department of the Interior, *Federal Indian Law* 398 (1958).

This principle finds both its source and continuing vitality in a series of decisions of this Court spanning approximately 150 years.

In the seminal case *Worcester v. State of Georgia*, 6 Pet. 515 (1832)—the foundation for the development of federal Indian Law—Chief Justice Marshall confirmed that Indian tribes are both dependent conquered nations and sovereign governments with full power over their people and territories. Marshall held that Indian nations:

> had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power. . . .

6 Pet. at 559.

The concept that the political powers of Indian tribes derive from a form of sovereignty, rather than from delegations of power by the United States, was recognized by this Court in *United States v. Kagama*, 118 U.S. 375 (1886):

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations. . . .

118 U.S. at 381-82.

This was again confirmed in *Talton v. Mayes*, 163 U.S. 376 (1896). In holding that the Fifth Amendment did not reach the criminal procedure of tribal courts, this Court acknowledged that the powers of Indian tribal courts derive from the continuing inherent sovereignty of the tribe, and not from federal delegation.[14]

In 1934, the Solicitor of the Department of the Interior synthesized this rule in the following manner, in a major opinion issued upon passage of the 1934 Indian Reorganization Act, 48 Stat. 984:

> Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designated to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content.

Powers of Indian Tribes, 55 I.D. 14, 19 (1934). *See also* 55 I.D. at 19-30.

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14. *See* discussion in Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 556-57 (1976) [hereinafter cited as Clinton (1976)].

Then, in *Williams v. Lee*, 358 U.S. 217 (1959) it was observed that the principles of *Worcester* have been modified by this Court *only* in those instances not involving essential tribal interests or Indian rights:

> Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained.

358 U.S. at 219. *See McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168-72 (1973).

More recently, in *United States v. Mazurie*, 419 U.S. 544 (1975) this Court held:

> Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515, 557 (1832). . . .

419 U.S. at 557.

In summary, a continuum of this Court's decisions, over the past one and one-half centuries, consistently reflects that Indian tribes have from the outset been, and remain today, "quasi-sovereign" political entities. *Morton v. Mancari*, 417 U.S. 535, 554 (1974); *Fisher v. District Court*, 424 U.S. 382, 390 (1976).[15]

Analytically, then, the precise questions to be answered are: (1) does the jurisdictional power exercised by the Suquamish Tribe in these cases fall within its original inherent powers of sovereignty? and (2) if so, has Congress, by statute or treaty terminated that power?

Finally, in answering this second question, it is essential to recall that such termination of a power of a tribe must

15. *See* Brief for Amici Quinault Tribe and Lummi Tribe for an extensive analysis of the sovereignty doctrine.

be done expressly, and will not be implied:

> According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred.

United States v. Nice, 241 U.S. 591, 599 (1916).

These questions will now be addressed. An analysis of all relevant treaties and statutes reveals that the jurisdictional power exercised by the Suquamish Tribe in these cases is an attribute of its original sovereignty which has not been expressly terminated and which remains, therefore, a power of the Tribe today.[16]

2. Through Early Statutes and Treaties, the United States Recognized Tribal Authority Over Non-Indians. That Authority Has Not Been Subsequently Extinguished By Statute.

As discussed in section 1, *supra* there is no question but that Indian tribes, as separate and distinct nations, possessed the usual accoutrements of a sovereign government. That is, they had distinct social, political and economic systems and effective law enforcement mechanisms.[17]

This inherent power was recognized in the early treaties and statutes regulating the relationship between the United States and Indian tribes.[18]

16. Commentators have reached consistent conclusions by independent analysis;

> [T]here has never been explicit federal legislation depriving tribal governments of jurisdiction over non-Indians.

Price, *Law and the American Indian* 173 (1973); *Accord*, Clinton (1976), *supra* note 14 at 558.

17. *See, generally*, Llewellyn, *The Cheyenne Way* (1941); Reid, *A Law of Blood* (1970); Clinton (1976), *supra* note 14 at 553.

18. *See* Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 954 (1975).

a. *Early Treaties*

One of the first treaties between the United States and a tribe was the Treaty with the Delawares, 1778, 7 Stat. 13. The treaty (at Article IV) expressly recognized tribal jurisdiction over non-members:

> For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender . . . till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice.

Under Article V of the Treaty with the Wyandot, etc., 1785, 7 Stat. 16, any person settling on tribal lands would "forfeit the protection of the United States, and the Indians may punish him as they please."[19]

In addition to recognizing tribal jurisdiction over non-Indian settlers, many of these early treaties also provided for federal prosecution of Indians and non-Indians for certain crimes committed within the Indian territory.[20] This imposition of federal criminal jurisdiction did not create an exclusive federal jurisdiction. Rather, it established a federal jurisdiction concurrent with the continuing jurisdiction of the tribe. Thus, the language in these early treaties clearly shows congressional recognition of tribal sovereign power over non-Indians on tribal lands.

19. The same or similar language appears in almost all of the early treaties. *See* Treaty with the Cherokee, 1785, Art. V, 7 Stat. 18; Treaty with the Choctaw, 1786, Art. IV, 7 Stat. 21; Treaty with the Chickasaw, 1786, Art. IV, 7 Stat. 24; Treaty with the Wyandot, etc., 1789, Art. IX, 7 Stat. 28; Treaty with the Creek, 1790, Art. VI, 7 Stat. 35; Treaty with the Cherokee, 1791, Art. VIII, 7 Stat. 39; Treaty with the Wyandot, etc., 1795, Art. VI, 7 Stat. 49.

20. *See* Treaty with the Wyandot, etc., 1785, Art IX, 7 Stat. 16; Treaty with the Cherokee, 1785, Art. VI, 7 Stat. 18; Treaty with the Choctaw, 1786, Art. V, 7 Stat. 21; Treaty with the Chickasaw, 1786, Art. V, 7 Stat. 24; Treaty with the Creek, 1790, Art. VIII, 7 Stat. 35; Treaty with the Cherokee, 1791, Art. X, 7 Stat. 39.

b. *Early Statutes*

The 1802 codification of the Indian Trade and Intercourse Act provided for federal prosecution of United States citizens committing crimes on Indian land. 2 Stat. 139 (1802). The Act expressly applied only to lands specifically described by metes and bounds. The Act was amended in 1817, 3 Stat. 383, to further extend federal criminal jurisdiction over Indians on Indian lands, except for offenses by one Indian against another. Furthermore, the 1817 enactment specifically preserved all treaty provisions safeguarding tribal jurisdiction over such matters. This Act, as modified by the Trade and Intercourse Act of 1834, 4 Stat. 729, 733, and by further amendment in 1854, 10 Stat. 270, constitutes (with minor changes) the present 18 U.S.C. §1152.

Petitioners argue that by 1817 the imposition of federal jurisdiction in the early Trade and Intercourse Acts ended any existing tribal jurisdiction over non-Indians. However, this contention is squarely at odds with the terms of subsequent treaties. For example, the Treaty with the Sioune and Oglala Tribes, 1825, Art. 5, 7 Stat. 252, specifically provided for the termination of existing tribal jurisdiction over non-Indians. Such a provision would have been clearly unnecessary if, as Petitioners contend, tribal jurisdiction had already been extinguished. Thus, notwithstanding the existence of the Trade and Intercourse Acts, it was apparently the view of Congress that specifically negotiated

treaty language was necessary to eliminate the continuing concurrent tribal power.[21]

c. *1834 Trade and Intercourse Act*

As the above analysis of the early treaties and statutes and *Worcester v. Georgia, supra* demonstrates, at the time of the passage of the 1834 Trade and Intercourse Act, 4 Stat. 729, both Congress and the Supreme Court agreed that Indian tribes were dependent, quasi-sovereign nations whose original powers could be changed only by treaty or by act of Congress; and that absent such express action, tribes would be free to continue to exercise those powers inherently possessed by any nation.

The legislative history of the 1834 Act, and its companion bills, is instructive in determining the effect of this legislation on tribal powers.

Three bills, comprising a legislative package, were considered by the House Committee on Indian Affairs.[22] The first bill provided for the organization of a Department of Indian Affairs. The second bill revised and made permanent the earlier Trade and Intercourse Acts. And the third bill established the "Western Territory," a territory to be reserved to all Indian tribes within its boundaries, who

21. This analysis is supported by the earliest writing on the subject of jurisdiction over non-Indians. In 1824 Judge Hugh L. White of Tennessee wrote an opinion for the Cherokee Tribe, which was submitted by the tribe to Congress in the form of a Memorial. Vol. 3, *Indian Congressional Documents*, 20th Cong., 2nd Sess. (1828-29), Doc. No. 124. In his opinion, at 8-9, Judge White concluded that the Cherokee Tribe may have given up its criminal jurisdiction over non-Indians through specific treaty stipulations, but noted that the very fact that a treaty on the subject was entered into is evidence of the fact that the tribe did originally have such jurisdiction, and that this jurisdiction was recognized by the United States.

22. The interrelationship of these bills is described in House Report No. 474, 23rd Cong., 1st Sess., June 20, 1934, at 1, [hereinafter cited as House Report].

would join together in establishing a territorial confederated government.

Trade and Intercourse Bill

Section 26 of the Trade and Intercourse Bill[23] provided as follows:

> That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian Country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

House Report at 32.

The House Report states that the purpose of the Trade and Intercourse Bill simply was to *assist* Indian tribes with a major problem then facing them: offenses being committed in their territories by non-Indians. It was recognized that tribal governments then in their early stages, needed *assistance* with non-Indian offenders, since punishment by the traditional family and tribal institutions of justice was not, by itself, clearly equal to the task of adequately punishing non-Indians:

> It will be seen that we cannot, consistently with the

23. This section later became §25 of the Trade and Intercourse Act of 1834 and is now codified, as amended, as 18 U.S.C. §1152 (1970):

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

> provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed *by or against Indians,* of which the tribes have *exclusive* jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits. [emphasis added]

House Report at 13.

A careful examination of the interrelationship of this Bill and the Western Territory Bill independently confirms that Congress did not intend that the Trade and Intercourse Bill would extinguish existing tribal jurisdiction over non-Indians.

Western Territory Bill

The Western Territory Bill would have established a territory in a part of the area covered by the Trade and Intercourse Bill. This territory would be governed by a confederation of those Indian tribes resident therein electing to join the confederation. Certain powers relating to strictly intertribal matters would be conferred on the confederation, and a General Council of the involved tribes would assume specified duties.

In fact, the only criminal jurisdiction to be exercised by the confederated government, rather than the member tribes, was: (1) the punishment of Indians fleeing from one tribe to another, and (2) the punishment of Indians of one tribe who commit crimes against Indians of another. This is a jurisdiction not unlike the federal diversity jurisdiction in civil matters.

Except for powers expressly conferred on the confederated government, the member tribes would continue to exercise their own powers. The scheme resembled closely the federal-state system created under the Constitution only 50 years before.

Moreover, federal interference with both the tribal and confederated governments would be minimal:

> The object of this union is to do those things, and those only, which the tribes separately are incompetent to do. The regulations of trade and intercourse among the tribes should be liberal and uniform. . . .

House Report at 19.

The limited nature of the intended interference with tribal self-government is also shown by the following language:

> [A veto power of the Governor over the acts of the territorial council] and the pardon of offenders in capital cases, are the only instances in which the political power of the United States will interfere with that of the tribes, or the confederation.

House Report at 19-20.

The Western Territory Bill did not purport to confer upon the individual tribes any jurisdiction over their own members or over non-Indians. Rather, it in fact recognized and affirmed the existing power of each tribe over all persons within its territory.[24] Furthermore, it purported to limit that power only in two respects.

The Bill[25] provided that governmental employees and representatives, and transients would be under the protection of and subject to the laws of the United States. It

24. §3 of the Act. House Report at 35.
25. House Report at 36.

provided further that if such person were to commit an offense against the law of the tribe, he would be removed from the lands of that tribe by the Governor of the Territory. Thus, non-Indians permanently residing within the tribe's territory would remain subject to the jurisdiction of the tribe. This arrangement is analogous to treaty provisions between the United States and foreign nations which provide for diplomatic immunity for certain United States citizens when on the foreign territory.

The only other language of the Western Territory Bill expressly affecting tribal jurisdiction over non-Indians was:

> [I]n all cases when a person not a member of any tribe shall be convicted of an offense, the punishment whereof by the laws of the tribe shall be death, the judgment shall be forthwith reported to the Governor, who may, for good reasons, suspend the execution thereof until the pleasure of the President shall be known.

House Report at 37.

Moreover, the House Report unequivocally reflected Congress' belief that Indian tribes possessed jurisdiction over non-Indians within their territorial boundaries:

> As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.

House Report at 18.

Furthermore, the Western Territory Bill (at section 3) recognized the right of a tribe to establish and maintain "such government for the regulation of their own internal concerns, as to them may seem proper." The meaning of this section is set forth clearly in the House Report:

> The right of self-government is secured to each tribe, with jurisdiction over *all* persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations. [emphasis added]

House Report at 18.[26]

Legislative History of Bills

In fact, the entire legislative history of the 1834 legislative package demonstrates that Congress intended a pattern of federal and tribal *concurrent* jurisdiction, in addition to a limited jurisdiction for the confederated government of the Western Territory.

The Trade and Intercourse Bill and the Western Territory Bill were envisioned as companion pieces of legislation, functioning in mutual harmony. Section 26 of the Trade and Intercourse Bill (§25 of the Act) would continue to be applicable within the Western Territory. In fact, neither the Trade and Intercourse Bill nor the Western Territory Bill provided that the provisions of the former would not apply in the Western Territory. Moreover, section 13 of the Western Territory Bill specifically provided that the trade and intercourse between the United States and the Indian tribes would continue to be regulated by the Trade and Intercourse Laws.

As demonstrated below, it is quite clear from the legislative history that the Western Territory tribes would retain criminal jurisdiction over non-Indians *concurrent* with the federal jurisdiction assumed by the United States under the Trade and Intercourse Act. Accordingly, it cannot success-

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26. This legislative history shows that the "internal concerns" of an Indian tribe encompass all persons and property within its limits." It is not limited merely to matters in which only Indians are involved.

fully be argued that the effect of the Trade and Intercourse Act was to oust tribal jurisdiction over non-Indians.

That federal jurisdiction over non-Indians would be concurrent with existing tribal jurisdiction is demonstrated in the supporting documents appended to the House Report. The bills in large measure tracked the recommendations in the written report of the Commissioners of Indian Affairs to the Secretary of War, dated February 10, 1834.[27] That report is redolent with alarms about the evils visited by unprincipled whites living and sojourning with them and the necessity for the exercising of jurisdiction by the tribes over resident non-Indians. Their report supports the concept of concurrent administration of law by the United States and the tribes themselves:

> *Residence of White Men*
>
> If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men. Some have eluded the pursuit of justice, and located themselves here, where they fancy themselves free from punishment for the past, and without restraint for the future.
>
> Already a jealousy exists between the citizens and red men, although connected by conjugal ties; and while the Indians must be permitted to marry if they choose citizens of the United States, yet these citizens need not be recognized as Indians, or encouraged to settle in the Indian country; *nor ought these citizens, while sojourning with the red man, to be protected from the full operation of the Indian laws, however severe.*
>
> • • • •
>
> *Organization of the Territory*
>
> Before the organization of the Indian Territory is proposed, it may be proper to advert again to the situa-

27. Documents "S" and "T" appended to the House Report.

> tion of the red men, both indigenous and emigrant: the former have always enjoyed their own laws and customs; the latter have left their residence within the States, to find a home beyond the municipal regulations of white men, while Government has reserved a constitutional supervision over all her red children. She has solemnly guarantied protection of life and property to every tribe who removes here, and given an assurance that no State or Territory shall exercise jurisdiction over them. *Hence, intercourse laws are necessary; they may be made so energetic, too, as to deter offenders, be they either citizens of the United States or individuals of another tribe. All this may be done without impairing in the least the independence of a tribe within its own limits.*
>
> *Within these limits . . . the municipal laws of the tribes may be enforced; and, should the laws of the tribes and the laws of the United States give concurrent remedies, this would create no difficulty. It is, indeed, desirable to encourage the several tribes to adopt salutary laws, as far as possible, and render less frequent the intervention of Government.* . . . [emphasis added]

House Report at 98,100.

This view—that the Western Territory Bill did not *create* tribal power but merely *limited* it and provided for a confederated government to deal with certain issues among the tribes and the United States—is supported by the debates in Congress regarding the Bill. Representative Everett noted that section 3 of the Bill was intended "to secure and perpetuate the right of self-government, so far as related to the tribes themselves" rather than to *create* such a right.[28] He assured the objecting members that the Bill "contained nothing which went to touch, in the slightest degree the rights of the tribes, as to their own con-

28. 10 Conc. Deb. 4764 (1834).

cerns."[29] He noted that section 9 providing for review by the Territorial Governor of all capital cases was a "restriction on the natural rights of the Indians, but one which was expedient and necessary."[30]

Representative Wayne stated that the limited purpose of the Bill was to give Indian tribes:

> an opportunity of entering, if they considered it most for their interest to do so, into a confederacy for their mutual advantage, to prevent the recurrence of private wars and civil feuds and strifes among themselves, and thereby to obviate the necessity of any forcible interposition of the power of the United States in their concerns. This was the whole end and scope of the bill.

Ultimately, in 1834 the Trade and Intercourse Bill and the Department of Indian Affairs Bill were enacted into law. However, the Western Territory Bill was tabled for further consideration at the next session of Congress. But, it was never enacted into law, though revised versions of it were resubmitted from time to time.[31] Whatever reasons may be given for the failure of the Western Territory Bill, it does not appear that concern about tribal jurisdiction over non-Indians played any significant role. The reasons for its failure were varied and numerous, among them objections to certain despotic aspects of the form of government proposed for the Territory noted by Rep. Adams; blatant appeals to racism by Rep. Archer of Virginia; and questions as to the amount of territory to be encompassed

29. *See* discussion at note 26, *supra* regarding the meaning of these "concerns".

30. 10 Cong. Deb. 4767 (1834).

31. *See* Gittinger, *The Formation of the State of Oklahoma*, (Univ. of Oklahoma Press, 1939) for a history of these Bills and Indian tribal resistance to them.

within the Western Territory noted by Rep. Wayne.[32]

Whatever else may be said of the Trade and Intercourse Act of 1834 it cannot be said that the failure of Congress to enact the Western Territory Bill into law converted the Trade and Intercourse Act into a "preemption" statute. That Act was conceived in Committee as recognizing concurrent jurisdiction and was debated in Congress in that same context. And, as enacted, section 25 of the Act is fully compatible with the exercise of tribal jurisdiction over those matters covered by its provisions.

Finally, it must be observed that Petitioners' thesis—that the language of the 1834 Act must be read as extinguishing all criminal jurisdiction of the tribe, except the expressly reserved jurisdiction over "crimes committed by one Indian against the person or property of another Indian"—leads to a result which even Petitioners would reject. Under such an analysis, the criminal jurisdiction assumed by the United States under the 1834 Act was exclusive, extinguishing tribal jurisdiction. However, this federal assumption of jurisdiction included within its coverage crimes by tribal members against non-Indians. Thus,

32. *See* 10 Cong. Deb. 4768-79 (1834). Representative John Quincy Adams did object to the idea that a section of the Bill would create "double jurisdiction" in that one act may be an offense against the "laws of the United States and the laws of the Indians." *Id.* at 4771. However, Representative Adams was wrong since that section did not involve double jurisdiction. He was referring to section 8 of the Bill which provided that representatives of the United States and temporary sojourners through the Indian territory would be subject to the laws of the United States. If such person would commit an offense against the laws of the United States, he would be prosecuted for it. If, however, such person committed an offense against the laws of an Indian Tribe, it would be grounds for removal by the Territorial Governor, not prosecution. This analysis is supported by the House Report (at 18), and section 8 was to be regarded as a limitation on existing tribal authority "somewhat analogous to the international laws among civilized nations." House Report at 18.

Petitioners' analysis must lead to the conclusion that subsequent to the 1834 Act, a tribe no longer possessed power to punish *its own members* for such criminal activity—a conclusion which even Petitioners would surely reject.

d. *Post-1834 Statutes and Treaties*

The foregoing analysis is confirmed by several post-1834 congressional actions demonstrating: (1) that it was the view of Congress that tribal jurisdiction was not affected by the 1834 Act; and (2) that unless there is an express termination of tribal jurisdiction, any assumption of federal jurisdiction is concurrent only.

In 1854 Congress amended the Trade and Intercourse Act.[33] However, had the 1834 Act totally preempted tribal jurisdiction over the covered matters—such as crimes by Indians against whites—the 1854 amendment would not have been necessary. That amendment barred federal prosecution of Indians for such crimes if they had already been punished by the tribe. The amendment confirms that tribal jurisdiction continued to exist in matters over which federal jurisdiction was extended by the 1834 Act.[34]

In 1855, the Treaty with the Choctaw and Chickasaw, 11 Stat. 611, was executed. However, the notion that the 1834 Act extinguished the concurrent tribal jurisdiction over non-Indians cannot be reconciled with the following language in Article 7 of that treaty:

> So far as may be compatible with the constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; *excepting, however, all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe.* . . . [emphasis added]

33. §3 of the Act of March 27, 1854, 10 Stat. 269, 270.

34. See additional discussion of 1854 Act, *infra*.

The emphasized language would be mere surplusage if, as Petitioners' contend, such jurisdiction had already been extinguished in 1834.[35]

Finally, in 1885, Congress enacted the Major Crimes Act.[36] That Congress understood the necessity of expressly terminating tribal jurisdiction in order to make federal jurisdiction exclusive is clearly seen in the history of that Act.

In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that the federal government did not have jurisdiction to try an Indian for the murder of another Indian in Indian country. Crow Dog had been tried and

35. It is noteworthy that even the specific language of this treaty was not deemed sufficient to prevent the Chickasaws from taxing the persons and the property of local non-Indians. *Morris v. Hitchcock*, 194 U.S. 384 (1904), *Aff'g.* 21 App. D.C. 565 (1903). The Appellate Court in *Morris*, affirmed by the Supreme Court, stated:

> Where the restriction upon this exercise of power by a recognized government, is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction in the clause of Article 7 of the Treaty of 1855, which excepts white persons from the recognition therein of the unrestricted right of self-government by the Chickasaw Nation, and its full jurisdiction over persons and property within its limits. The conditions of that exception may be fully met without going to the extreme of saying that it was also intended to prevent the exercise of the power to consent to the entry of non-citizens, or the taxation of property actually within the limits of that government and enjoying its benefits.

21 App. D.C. at 593-94.

36. 23 Stat. 385 (1885), now codified, as amended, at 18 U.S.C. §1153 (1970).

convicted by tribal authorities, and the traditional penalty of support of the decedent's family was imposed. In response to this case, Congress passed the Major Crimes Act to provide for federal jurisdiction with respect to certain enumerated Indian vs. Indian crimes.

The first version of the Major Crimes Act was introduced on the floor of the House of Representatives in 1885 as an amendment to the Indian Appropriations Bill. As originally presented, it read in part as follows:

> Sec. 10. That immediately upon and after the passage of this act all Indians within the provisions of this act committing against the person or property of another Indian any of the following crimes . . . shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner *and not otherwise* and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively. [emphasis added]

16 CONG. REC. Pt. II at 934 (1885).

At the suggestion of Rep. Budd, this amendment was modified so as to delete the words "and not otherwise," in order to avoid stripping tribal courts of concurrent jurisdiction.

> MR. BUDD. I desire to suggest another modification of the amendment—to strike out the words "and not otherwise." The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction.

16 CONG. REC., *supra* at 934.

There was no debate on the modification proposed by Rep. Budd, but the amendment was adopted by the House in the modified form.

This legislative history demonstrates that when Congress intends to strip away tribal jurisdiction, it does so with *express* language, and not by implication. Petitioners' position—that in 1834 Congress *impliedly* extinguished tribal jurisdiction—is flatly at odds with this rule.

Moreover, this is in fact but an example of an analogous principle of dual governmental authority: when federal jurisdiction is extended into an area traditionally subject as well to state or local jurisdiction, that federal jurisdiction is considered concurrent with continuing state or local jurisdiction, unless Congress expressly provides otherwise. Thus, in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946), this Court stated:

> Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . .

Similarly, in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962), this Court declared:

> Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.

And, it was noted that this Court has been consistently disposed:

> to affirm the [continuing state] jurisdiction, where it is not excluded by express provision, or by incompati-

> bility in its exercise arising from the nature of the particular case.

368 U.S. at 508.

Finally, this principle applies fully to criminal matters, the particular subject of the instant cases:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

United States v. Lanza, 260 U.S. 377, 382 (1922), quoted in *Abbate v. United States*, 359 U.S. 187, 194 (1959).

e. *Petitioners' Authorities Do Not Show a Termination of Tribal Authority Over Non-Indians*

1854 Amendment

The only congressional enactment after 1834 urged by Petitioners as a recognition of the termination of inherent tribal jurisdiction over non-Indians is the 1854 Amendment to the 1834 Trade and Intercourse Act.

In 1854, section 25 of the Trade and Intercourse Act was modified to eliminate the possibility that an Indian subjected to tribal discipline could also be tried in federal court.[37] Petitioners argue that the 1854 Congress' failure to provide similar protection to *non-Indians* subjected to tribal discipline confirms that tribes lack power to punish non-Indians. Since there is no legislative history of the 1854 Amendment supporting Petitioners' argument,[38] Petitioners

37. §3 of the Act of March 27, 1854, 10 Stat. 270.

38. As the Ninth Circuit noted in its opinion (544 F.2d at 1010n.3) the 1854 Amendment was disposed of rapidly with little debate.

suggest that this Court merely *infer* such a conclusion. However, such an inference would ignore the facts and circumstances surrounding and giving rise to the 1854 Amendment.

First, the limited debate on the floor of the House[39] reveals that a particular case prompted the amendment. That case involved a Creek Indian who had already been prosecuted by his tribe. Thus, the question of double-jeopardy for *Indians* was the *only* matter directly before Congress at that time.

Secondly, as shown in the House Report on the Trade and Intercourse Act of 1834,[40] Congress assumed jurisdiction over Indians reluctantly. In fact, so long as Indian tribes were willing to exercise jurisdiction over their own members, there was no federal policy requiring federal intervention. Moreover, the policy of Congress was clear: the federal government would gladly subordinate its jurisdiction to that of the tribe in the punishment of tribal members.

But, such was not the case with non-Indian offenders. The federal government was greatly concerned that offenses by non-Indians against Indians would harm the uneasy relationship between the tribes and the United States. Thus, federal policy was to take the lead in prosecuting non-Indian offenders, without disturbing the continuing existence of concurrent tribal authority over the same individuals.

Finally, and perhaps most importantly, by 1854, the tribes as a matter of general *practice* deferred to the federal

39. 23 Cong. Globe 700-701 (1854).

40. House Report at 13.

authorities in the prosecution of non-Indians. This practice was a natural result as the Department of Indian Affairs became entrenched in Indian territories and took over the administration of Indian activities pursuant to treaties. The functioning of tribal government was impaired.[41] Thus, tribal prosecution of non-Indians was probably rare. It is reasonable, therefore, to assume that Congress would deal with the only jurisdictional problem that had come to its attention, namely, the Indian double jeopardy question.

Attorney General Opinions, Kenyon and Mayfield

Petitioners' failure to identify any congressional action—whether treaty or statute—terminating the original power of Indian tribes over non-Indians has already been demonstrated. It will now be shown that Petitioners' remaining arguments, which are based on *administrative* interpretations and *judicial* decisions, in fact provide no reliable support for Petitioners' position.

Petitioners' administrative and judicial authorities consist of: (a) two antiquated opinions of the Attorney General—an 1834 Opinion[42] and an 1855 Opinion;[43] (b) two easily distinguishable early cases—the 1878 circuit court decision *Ex parte Kenyon*[44] and the 1891 decision of this Court *In re Mayfield;*[45] and (c) a 1970 opinion of the Solicitor of the Department of the Interior based on *Kenyon* and the Attorney General Opinions, which was subsequently withdrawn by the Solicitor.[46]

41. *See* discussion in *Final Report of the American Indian Policy Review Commission*, Vol. 1 at 148, 162 (1977).
42. 2 Op. Atty. Gen. 693 (1834).
43. 7 Op. Atty. Gen. 174 (1855).
44. 14 F. Cas. 353 (C.C.W.D. Ark. 1878).
45. 141 U.S. 107 (1891).
46. 77 I.D. 113 (August 10, 1970), withdrawn January 25, 1974.

(1) The 1834 and 1855 Opinions of the Attorney General

Both the 1834 and 1855 Attorney General Opinions deal with the jurisdiction over non-Indians of the courts of the Choctaw Tribe. The 1834 Opinion deals with criminal jurisdiction; and the 1855 Opinion deals with civil jurisdiction. Each Opinion rests on interpretations of the provisions of a Choctaw Treaty[47] and federal law regarding jurisdiction over non-Indians in Indian Country.

In fact, the two Opinions reach different conclusions regarding the inherent power of tribes to exercise jurisdiction over non-Indians. In the 1834 Opinion, Attorney General Butler asserted that tribes could not exercise any form of jurisdiction over a United States citizen, arguing that submission to tribal court jurisdiction would in some way impair the obligations of that non-Indian to the federal sovereign.[48] There is, in fact, no explanation for Attorney General Butler's mysterious reasoning that amenability to a tribe's penal laws would in some manner reduce an individual's allegiance to the United States.

Subsequently, in the 1855 Opinion, Attorney General Cushing rejected that major premise of the 1834 Opinion. He held that a citizen of the United States could most certainly become subject to tribal jurisdiction:

> But the error in all this consists in the idea that any man, citizen or not citizen, becomes divested of his allegiance to the United States, or throws off their jurisdiction or government, in the fact of becoming subject to any local jurisdiction whatever. This idea misconceives entirely the whole theory of the Federal Government, which theory is, that all the inhabitants

47. Treaty of Dancing Rabbit Creek, 1830, 7 Stat. 333.
48. 2 Op. Atty. Gen. at 694-695.

> of the country are, in regard to certain limited matters, subject to the federal jurisdiction, and in all others to the local jurisdiction, whether political or municipal.[49]

Furthermore, the 1834 Opinion proceeded on yet another baseless supposition. The Attorney General surmised that, in enacting the 1834 Trade and Intercourse Act, Congress was:

> evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves. . . .[50]

He then reasoned that the 1834 Act was enacted to fill that assumed jurisdictional vacuum. However, Respondents have already demonstrated, *supra* that no such jurisdictional vacuum existed and that the 1834 Congress did not assume the existence of such a void. Unfortunately, however, the invalidity of Attorney General Butler's 1834 supposition was compounded in 1855, when Attorney General Cushing uncritically embraced it.

Finally, the 1834 Opinion relies on a provision peculiar to the involved treaty. Specifically, language (in Article IV) by which the Choctaws expressed a wish that Congress would "grant" them the rights to punish white men by their own laws. In light of Respondents' early treaty and statutory analysis, *supra* this "request" is incongruous and certainly ambiguous. A likely inference is that it was the result of uninformed and misleading representations made to the Choctaws by the treaty negotiators. The involved treaty language appears in no other treaty.

Thus, once again, the 1855 Opinion simply accepted an erroneous element of the 1834 Opinion's analysis. However,

49. 7 Op. Atty. Gen. at 177-178.
50. 2 Op. Atty. Gen. at 695.

in this instance it led to a proper result, namely a conclusion that the tribe possessed civil jurisdiction over non-Indians. Noting that the treaty is "absolutely silent on the question of civil jurisdiction,"[51] the Attorney General then held that the Choctaw therefore possessed civil jurisdiction over non-Indian matters within their territory:

> By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.[52]

It is noteworthy that the analysis employed by the Attorney General in 1855—that a tribe possesses those of its inherent powers not expressly extinguished by treaty or statute—is precisely the analysis urged by Respondents and used by the Ninth Circuit in its decision below. Consequently, absent the erroneous guidance given by the 1834 Opinion, it is probable that the Attorney General in 1855 would have recognized the continuing existence of tribal criminal jurisdiction over non-Indians.

(2) Ex parte Kenyon and In re Mayfield

The circuit court in *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) held that the Cherokee Courts could not exercise criminal jurisdiction over a non-Indian. That conclusion was also erroneously based on the supposition that the 1834 Trade and Intercourse Act had extinguished such jurisdiction. Furthermore, the Court noted that there were two reasons for the Cherokee Tribe's lack of jurisdiction over the defendant:

1. The act of conversion being complained of took place *outside the reservation.*

51. 7 Op. Atty. Gen. at 180.
52. 7 Op. Atty. Gen. at 180-181.

2. The defendant was not an Indian.

Moreover, the court stated in its Opinion that the first ground was itself dispositive. Subsequently, in *Elk v. Wilkins*, 112 U.S. 94 (1884), this Court agreed, stating:

> In *Kenyon's Case*, Judge Parker held that the court in which the prisoner had been convicted had no jurisdiction of the subject matter, because the place of the commission of the act was beyond the territorial limits of its jurisdiction, and, as was truly said, "this alone would be conclusive of this case."

112 U.S. at 108.

Thus, *Kenyon* did not in fact pass on the issue before this Court: whether a tribe possesses criminal jurisdiction over non-Indians committing offenses *on the reservation*.

In re Mayfield, 141 U.S. 107 (1891) is the only other case cited by Petitioners as direct support for the proposition that there is no tribal jurisdiction over non-Indians. It is argued that *Mayfield* holds that the 1834 Trade and Intercourse Act restricted tribes to jurisdiction over Indians only. However, this is a clear misreading of this Court's opinion. The "statutes" the "general object" of which is discussed in the opinion[53] decidedly do *not* include the 1834 Trade and Intercourse Act. Rather two *other* acts, each dealing with criminal jurisdiction in the Cherokee territory, were interpreted by this Court.[54]

One of those acts,[55] this Court noted, contained the following language providing that the Indian tribes would:

> "'retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the

53. 141 U.S. at 116.

54. Act of March 1, 1889, 25 Stat. 783, and Act of May 2, 1890, 26 Stat. 81.

55. Act of May 2, 1890, §30, 26 Stat. 81.

> nation by nativity or by adoption shall be the *only* parties." [emphasis added]

141 U.S. at 115.

Moreover, both of these acts abrogated the Treaty with the Cherokee Nation, 1866, 14 Stat. 799 which had provided (in Article XIII) that the Cherokee courts would:

> retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, *or where the cause of action shall arise in the Cherokee Nation* . . . [emphasis added]

114 U.S. at 113.

Thus, the two acts involved in *Mayfield* (1) dealt specifically with the territory of Oklahoma; and (2) *expressly* limited Cherokee jurisdiction to tribal members only, deleting the additional jurisdiction retained under the prior treaty. Accordingly, Petitioners attempt to characterize the language of *Mayfield* regarding jurisdiction over non-Indians as a general statement of federal Indian law is simply invalid.

(3) The 1970 Opinion of the Solicitor of the Department of the Interior

The 1970 Solicitor's Opinion[56] is founded exclusively on the 1834 and 1855 Attorney General Opinions and *Kenyon*. Thus, for the reasons discussed above, the Solicitor's Opinion lacks a sound analytical foundation. Presumably, realization of this prompted its withdrawal in 1974.

Finally, it is regrettable that this defective progression of Attorney General Opinions, cases, and Solicitor's Opinion caused the committees of Congress to embrace the legal conclusions reflected in the legislative histories of the

56. 77 I.D. 113 (August 10, 1970).

1960 and 1970 enactments discussed in briefs of Petitioners and *amici*.[57] This classic example of the dangers of legal bootstrapping would in fact not have occurred had the Solicitor or the Congressional committees critically examined these "authorities." However, minimal weight should be given the views of those Congressional committees regarding interpretation of the early federal jurisdictional acts:

> [T]he views of one Congress as to the construction of a statute adopted many years before have "very little, if any, significance." [citations omitted]

U.S. v. Southwestern Cable Co., 392 U.S. 157, 170 (1968).

3. The Treaty of Point Elliott Did Not Extinguish the Suquamish Tribe's Authority Over Non-Indians.

An examination of the facts and circumstances surrounding enactment of the 1855 Treaty of Point Elliott, 12 Stat. 927,[58] and of the terms of the adopted treaty reveals the following:

57. Pet. Brief at 114. Brief for Amicus Curiae Kitsap County at 50, 56; Brief for the State of South Dakota *et al.* as Amici at 22.

58. The materials evidencing the history of the Treaty are contained in microfilm rolls of the records of the Federal Government in the National Archives, relating to the Washington Superintendency of Indian Affairs. These materials constitute the legislative history of this statute, which, of course, may be judicially noticed. *Territory of Alaska v. American Can Co.*, 358 U.S. 224 (1959). The court may consider the historical setting from which the statute arose to determine congressional intent. *The Delaware*, 161 U.S. 459, 474 (1896); *Platt v. Union Pacific R.R.*, 99 U.S. 48, 67 (1878). In fact, in determining the intent of acts and treaties involving Indian tribes, the "surrounding circumstances" and "legislative history" are to be accorded paramount weight. *DeCoteau v. District County Court*, 420 U.S. 425, 444-45 (1975). Included in such "circumstances" are the instructions to the treaty commissioners. *Citizens Band of Potawatomi Indians v. United States*, 391 F.2d 614, 619 (Ct. Cl. 1967). Certified copies of the above-referenced materials are reproduced in the Appendix to Respondents' Brief, which also includes a verbatim transcript for the Court's convenience.

(1) The federal government in *1854*—20 years after enactment of the 1834 Trade and Intercourse Act—believed that express treaty language was necessary to divest the Suquamish Tribe of criminal jurisdiction over non-Indians;

(2) Such treaty language was sought by the treaty commissioners but not obtained in the treaty negotiation; and

(3) The approved treaty did not contain language extinguishing the Tribe's jurisdiction over non-Indians.

This examination will be conducted in light of the cardinal rule:

> [T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.

United States v. Winans, 198 U.S. 371, 381 (1905).

a. *The Proposed Treaty Provisions*

On August 30, 1854, Acting Commissioner of Indian Affairs Charles Mix by letter requested Isaac Stevens, Governor of the Washington Territory, to negotiate treaties with the Indian tribes in the Washington Territory.[59] Although Mix gave Stevens no *specific* instructions as to the details of the treaties, he did enclose the treaties recently concluded with the Rogue River Tribe and Cow Creek Band in Oregon and with the Omaha and Ottoe and Missouria Tribes. Mix advised Stevens that those treaties contained provisions recommended for use in the Washington Territory negotiations, pointing out that they reflected the policy of the government regarding the matters covered.

59. National Archives, Microcopy No. 5, Roll No. 7, Records of the Washington Superintendency of Indian Affairs, Letters from the Commissioner of Indian Affairs, 1853-59 (pages A-1-12 *infra*.)

Approximately three months later, the Washington Territory Treaty Commissioners met at Olympia, Washington, discussed the above treaties, and directed Treaty Commissioner Gibbs, a lawyer, "to prepare a programme of a Treaty in accordance with the views of the Commission."[60]

Three days later, the Commission met again and adopted a proposed form of treaty "as the basis of the Treaties to be held with the Tribes upon the [Puget] Sound and the Pacific Coast. . . ."[61] This proposed form of treaty contained fourteen articles. In particular, Article VIII covered criminal offenses by or against non-Indians:

> The United States also to indemnify the Indians for horses stolen by the whites.
>
> Citizens of the United States may safely pass through their reserve. . . . *Injuries committed by whites towards them not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished.* Injuries by Indians to whites to be in like manner prosecuted and punished according to law.
>
> Every tribe to be responsible for offenses committed by its people or by others in their lands. Chiefs in the first instance to be looked to and required to deliver up criminals at once—to be in return supported in the exercise of their lawful authority by the Government. [emphasis added]

Offenses by tribal members were covered by Article XII:

> Tribes may punish offenders of their own Tribe for any offense committed, according to their laws, a majority of the Chiefs forming a court for the trial of all offenders.

60. *Records of the Proceedings of the Commission to hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country*, National Archives, Microcopy No. 5, Roll No. 26, Records of the Washington Superintendency, 1853-74, Records relating to Treaties, 1854-63 (pages A-14, 18 *infra.*).

61. *Id.* (pages A-14-22 *infra.*).

It is quite clear, then, that under the proposed treaty provisions, the Suquamish Tribe would have relinquished jurisdiction to the United States as to offenses committed by or against non-Indians, and would have retained only its jurisdiction over strictly Indian offenses. Thus, some 20 years after the enactment of the 1834 Trade and Intercourse Act, it was the view of the federal government that the Washington Territory tribes, including the Suquamish, possessed criminal jurisdiction over non-Indians.

b. *The Language of the Approved Treaty*

Approximately six weeks later, the Treaty of Point Elliott was signed.[62] Without a doubt, the Treaty is derived directly from the proposed form of treaty described, *supra.* All of the provisions of the approved Treaty (except the extradition provision discussed below) correspond to comparable provisions in that proposed form. Significantly, the *only* provisions of the proposed form *not* incorporated in the approved Treaty were the above-quoted criminal jurisdiction provisions.[63]

Admittedly, there is no evidence expressly indicating the reasons for the deletion of the proposed criminal jurisdiction provisions. However, since those provisions were the only provisions not included, it is quite clear that their absence may not be attributed to inadvertance. Rather,

62. In the Agreement of May 28, 1904 (ratified by Congress in 1905 (33 Stat. 1078) the Suquamish ceded to the United States approximately 48 acres of reservation land for eventual use as a military site. This Agreement reserved to the Tribe "any benefits" to which they were entitled under previous treaties or agreements. The Treaty of Point Elliott is the only other treaty or agreement between the United States and the Tribe.

63. It is noteworthy that while the above-quoted criminal jurisdiction provisions of Article VIII of the proposed form were deleted, all other provisions of that Article VIII *were* incorporated in the approved Treaty.

the most logical conclusion is that, during the period between the adoption of the proposed form of treaty and the signing of the approved Treaty, it became apparent that termination of the Tribe's jurisdiction over offenses by or against non-Indians could not be secured.

Furthermore, the *only* language in the approved Treaty relating to criminal matters is in Article IX:

> And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

This language in fact constitutes nothing more than an extradition provision:[64] an agreement by the Tribe that it will not give sanctuary to fugitives from federal authority. By no stretch can it be properly characterized as a relinquishment of tribal criminal jurisdiction over non-Indians. As indicated above, the proposed form of treaty contained explicit language which concededly would have extinguished such tribal jurisdiction. However, this language was not adopted. It is clearly not reasonable, therefore, to construe the oblique extradition provision as accomplishing by implication the very purpose expressly embodied in the rejected language.

This becomes even clearer when the Point Elliott extradition provision is compared with the extensive provisions regarding criminal jurisdiction of other treaties of that period. *See, e.g.*, Treaty with the Choctaw and Chickasaw, 1855, Art. 7, 11 Stat. 611, 612-13; Treaty with the Cow

64. In *State ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970), the Ninth Circuit construed the comparable "deliver up" provision of the Treaty with the Navajo, 1868, Article I, 15 Stat. 667:

> These provisions recognized a jurisdiction in the Navajo Tribe over intersovereign rendition, at the time the relationship between the United States and the Tribe was originally defined.

Creek Band, 1853, Art. 6, 10 Stat. 1027, 1028.

Finally, the extradition provision in the Treaty is arguably applicable to all "offenders," both Indian and non-Indian. If, as Petitioners would argue, this provision divested the Suquamish Tribe of jurisdiction over such "offenders," then it must also have divested the Tribe of jurisdiction over *its own members*, a conclusion even Petitioners would reject.

In conclusion, Respondents submit that this treaty history reveals that the Treaty of Point Elliott not only did *not* diminish the Tribe's criminal jurisdiction, but in fact preserved and secured it.[65]

4. Decisions of This Court Affirm Tribal Authority Over Non-Indians on All Lands Within the Reservation, as to Matters in Which There Is a Sufficient Tribal Interest. Such a Sufficient Tribal Interest Exists in These Cases.

There is a significant body of case law, which includes two recent decisions of this Court, regarding the authority of an Indian tribe to regulate non-Indians with respect to their on-reservation activities. In sum, this body of law

65. It is the position of Respondents that it is sufficient to conclude that the Tribe retained concurrent jurisdiction over matters for which there is also federal jurisdiction.

However, the Solicitor General (Brief for the United States as Amicus Curiae at 36 *et seq.*) makes the following argument: In 1854, the Trade and Intercourse Act was amended to exclude the following cases from the reach of federal criminal jurisdiction in Indian country:

> any case where, by treaty stipulations, the exclusive jurisdiction over such offenses may now or hereafter be secured to said Indian tribes respectively.

10 Stat. 270. (Now codified at 18 U.S.C. §1152.)

This reinstated the "treaty" provision which had originally appeared in the 1817 Trade and Intercourse Act. The Solicitor General argues that the language of the Point Elliott Treaty contains such "stipulations" and that the Suquamish Tribe retained exclusive jurisdiction under this provision.

confirms the existence of such authority manifested in such areas as taxation, civil disputes and regulation of liquor.

Moreover, this case law disposes of the following ancillary issues: (1) whether tribal jurisdiction is dependent on the status—fee or trust—of the specifically involved reservation land; and (2) whether it is legally material that the non-Indian is disentitled to membership and political participation in the tribe. Both these questions are answered in the negative.

a. *Early Cases*

The first major decision to deal with the challenge of tribal authority over non-Indians on the reservation was *Morris v. Hitchcock,* 194 U.S. 384 (1903). This was a suit brought by non-Indians challenging an ordinance of the Chickasaw Nation which assessed a tax on non-Indians grazing cattle within the limits of the reservation. This Court relied principally on the treaties made with the Tribe which gave the Tribe the right to control the presence of non-members in its territory, and concluded that under these treaties, the Chickasaw Nation had the power to attach conditions to the presence of non-members within its borders. Accordingly, this Court upheld the tribal tax.[66]

The following year, the Eighth Circuit decided *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906). It held that the Creek Nation had power to tax non-Indians conducting business within the reservation, even though the business was conducted on lands owned by them in fee. The court held that the

66. A comparable provision is present in the Treaty of Point Elliott, Art. II, App. Pet. Brief at 8a.

Tribe's power to tax was not affected by the taxpayer's ownership or non-ownership of his land, nor by the existence of cities or towns within the reservation. Furthermore, the court rejected the notion that the applicable allotment acts, which expressly authorized non-Indians to enter and reside on the reservation, somehow divested Indian tribes of their power to tax non-Indians conducting businesses within their borders:

> It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek Tribe itself.

135 F. at 950. This power of the tribe to tax all persons within its boundaries has been repeatedly upheld in subsequent court decisions. *Barta v. Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

b. *Jurisdiction and Land Status*

The argument that tribal jurisdiction is dependent on the status—fee or trust—of the specifically involved reservation land, is also dealt with by the Eighth Circuit in *Buster v. Wright, supra*:

> The theory that the consent of a government to the incorporation and existence of cities upon its territory or to the conveyance of the title to lots or lands within it to private individuals exempts the inhabitants of such cities and the owners or occupants of such lots from the exercise of all its governmental powers,

> while it leaves the inhabitants of other portions of its country subject to them, is too unique and anomalous to invoke assent.

135 F. at 952.

Moreover, this argument—that jurisdictional power within the reservation turns on land status—was rejected quite firmly in recent decisions of this Court. In *United States v. Mazurie*, 419 U.S. 544 (1975) the defendant non-Indians argued that the Wind River Tribes had no valid authority to regulate defendants' liquor business, which was conducted on fee land within the Wind River Reservation. The assertion that the fee status of the land was jurisdictionally-significant was unequivocally rejected. *Id.* at 553-55. In doing so, this Court relied on *Seymour v. Superintendent*, 368 U.S. 351 (1962), which held that Congress has in fact not distinguished between fee and trust land in its statutory formulation of Indian jurisdiction.

More recently, in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), it was once again urged that the fee/trust distinction has jurisdictional significance— in this case, with respect to a state's taxing authority on the reservation. The argument was once more rejected, in reliance on both *Seymour* and *Mazurie*, and on the severe practical difficulties imposed on law enforcement by a checkerboarded jurisdictional scheme:

> We concluded [in *Seymour*] that "[s]uch an impractical pattern of checkerboard jurisdiction," ibid., was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also United States v. Mazurie, 419 US 544, 554-555 (1975).
>
> • • • •
>
> Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard"

> approach within an existing Indian resevation, and our cases have in turn followed Congress' lead in this area.

425 U.S. at 478, 479.[67]

Finally, surely the message of *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) and *Rosebud Sioux Tribe v. Kneip*, ... U.S. ...., 97 S.Ct. 1361 (1977), is that ultimately tribal political jurisdiction extends over *all* land contained within the true boundaries of the reservation. That is, where Congress has desired to relieve non-Indian entrants or their lands from that political jurisdiction, it has done so by express action calculated to alter the reservation boundaries, not the tribal power. No such action can be shown in these cases.

c. *Williams v. Lee*

In *Williams v. Lee*, 358 U.S. 217 (1959) this Court dealt with jurisdiction over a civil dispute between an Indian and a non-Indian arising from an on-reservation business transaction. This Court held that such jurisdiction properly rests in tribal court, rather than state court:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. *It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there.* [citations omitted] The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Nava-

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67. If, as Petitioners contend, jurisdiction should be a function not only of land status, but of tribal affiliation as well, then all law enforcement officers on the reservation would need not only a "tract book" (*Moe*, 425 U.S. at 478), but also a genealogical chart.

> jos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. [emphasis added]

358 U.S. at 223.

In its decision this Court relied on the scope of tribal court criminal jurisdiction. It acknowledged that state courts have been allowed to try on-reservation non-Indian vs. non-Indian crimes. Significantly, however, the Court then went on to declare:

> But if the crime was *by or against an Indian*, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.
>
> [emphasis added.]

358 U.S. at 220, quoted with approval in *McClanahan v. Arizoa Tax Commission*, 411 U.S. 164, 171 (1973).

Moreover, in reaching this conclusion, this Court analyzed treaty provisions—comparable to those in Article II of the Treaty of Point Elliott—setting apart a reservation for the exclusive use of the Navajo Tribe:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

358 U.S. at 221.[68]

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68. It is noteworthy that the language in the involved Treaty with the Navajo, 1868, Art. 1, 15 Stat. 667, dealing with offenses by non-Indians against Indians *explicitly* grants jurisdiction over such matters to the *federal government*. Nevertheless, this explicit language did not prevent this Court in *Williams* from determining that it did not matter that "respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there." It is significant that no such cession of Tribal jurisdiction appears in the Treaty of Point Elliott making the *Williams* rationale all the more compelling in the instant case.

In addition, *see* notes 26, *supra*, 79 *infra* for examination of the meaning of "internal affairs."

The facts of the present case fit squarely within the *Williams* framework: the non-Indian's "transaction" was with an Indian and took place on the reservation.

It is important to note that an affirmance in these cases will *not* (as was the case in *Williams*) result in the ouster of any competing jurisdiction. Respondents are merely seeking to vindicate their exercise, under appropriate circumstances, of a jurisdiction which is asserted by them to be concurrent only.

d. *United States v. Mazurie*

Williams v. Lee, supra rests fundamentally on the inherent governmental authority of the tribe over reservation affairs. The subsequent case, *United States v. Mazurie*, 419 U.S. 544 (1975), also rests on that inherent tribal authority, but in a somewhat different sense: *Mazurie* holds that *because of its inherent sovereignty*, a tribe may be authorized by the federal government to regulate the on-reservation sale and distribution of liquor, a matter ordinarily subject to exclusive federal regulation. Specifically, this Court upheld the exercise of that delegated authority as against non-Indians operating a tavern on fee land with the reservation:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. [citation omitted] Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. [citation omitted] Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over *both their members and their territory*. *Worcester v. Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulat-

> ing their internal and social relations. . .," *United States v. Kagama*, 118 U.S. 375, 381-382 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). [emphasis added]

419 U.S. at 556-57.

Secondly, *Mazurie* disposed of the contention that non-Indians, ineligible for membership or political participation in the tribe, cannot be properly subjected to the tribe's jurisdiction:

> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by this Court's opinion in *Williams v. Lee*, 358 U.S. 217 (1959). In holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians, we stated:
>
> > "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-566." *Id.*, at 223 [citations omitted].

419 U.S. at 557-58 (footnote omitted).

e. *Tribal Subject Matter Jurisdiction*

Petitioners argue that this Court must in these cases choose between two divergent concepts of tribal jurisdiction: (1) "personal" jurisdiction, reaching only the activities of tribal members; or (2) "territorial" jurisdiction,

covering all the activities of all persons while on the reservation. Respondents submit, however, that this Court need not choose between these two rigid extremes. Instead this Court may in these cases declare a flexible jurisdictional standard which in fact is already manifest in its recent Indian decisions.

This proposed standard, referred to as tribal subject matter jurisdiction, will permit a case by case development of the substantive content of tribal jurisdiction over non-Indians, through analysis of the actual tribal interest in, and nexus with, the particular events asserted to be subject to such jurisdiction. It will emphasize the actual subject matter of these events and *not* merely the tribal affiliation of the parties (as in "personal" jurisdiction) or the situs of the events (as in "territorial" jurisdiction).

In support of this, we submit that, in the final analysis, the authorities discussed in this section 4, stand for the following general jurisdictional principle: a tribe possesses jurisdiction to regulate by all appropriate means—civil or criminal—the on-reservation activities of non-Indians, as to which there is a sufficient tribal interest.[69]

At the heart of this suggested principle is the existence of a "sufficient tribal interest." Analystically, this is intended to reflect the actual nature of the jurisdictional analysis performed in such cases as *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976), *Fisher v. District Court*, 424 U.S. 382 (1976) and *United States v. Mazurie, supra,*

69. It is noteworthy that the United States in its Brief as Amicus Curiae (at 1) suggests this standard in the formulation of its "Question Presented." *See also* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 Utah L. Rev. 206, 222-24 (1973).

which is exemplified by the following language in *Williams v. Lee, supra*:

> Over the years this Court has modified these principles [of tribal jurisdiction] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained.

358 U.S. at 219.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. [citations omitted]

358 U.S. at 223.

Admittedly, one cannot fashion directly from existing Indian case law a rigorous general definition of "sufficient tribal interest." However, its practical meaning may be seen in concrete situations in which this Court has confirmed tribal jurisdiction over the on-reservation activities of non-Indians, such as: the taxable activities of the ranchers in *Morris v. Hitchcock*, 194 U.S. 384 (1904); the business transactions of the operator of the general store in *Williams v. Lee, supra;* and the licensing of the tavernkeeper in *United States v. Mazurie, supra.*[70]

Furthermore, this concept is both familiar and well-developed in the law of jurisdiction generally.[71]

70. This analysis is consistent with the line of cases in this Court holding that *absent* any Indian or federal personal or property interest, states may exercise jurisdiction over non-Indian v. non-Indian crimes. *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *Donnelly v. United States*, 228 U.S. 243, 272 (1913). *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).

71. *See generally* the discussion of "specific jurisdiction" in Von-Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).

"Long-Arm" Jurisdiction

Such a standard—sufficient tribal interest—is analogous to the standard adopted by this Court in determining the validity of state "long-arm" statutes. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) this Court upheld Washington State jurisdiction over a Delaware corporation stating:

> But to the extent that a corporation exercises the privilege of conducting activities with a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and so far as those obligations arise out of or are connected with the activities with the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319.

Similarly, this Court has upheld a statute providing that operation of a car on a state's highways was an implied consent to the jurisdiction of the courts of that state. In *Hess v. Pawloski*, 274 U.S. 352 (1926) the Court held that the statute would merely require a non-citizen of the state:

> to answer for his conduct in the State where arise causes of action alleged against him. . . .

274 U.S. at 356.[72]

Taxing of Foreign Corporations

This Court has affirmed the power of a state to tax foreign corporations on the ground that a "sufficient nexus" existed to support the tax, finding that the foreign cor-

72. At the time of the incidents herein involved, notices had been placed in prominent positions at the entrances to the Port Madison Indian Reservation to the effect that entry onto the Reservation lands would be deemed implied consent to the jurisdiction of the Suquamish Tribal Court. Appendix at 21.

porations were:

> sufficiently involved in local events to forge some definite link, some minimum connection sufficient to satisfy due process requirements.

Northwestern Cement Co. v. Minn., 358 U.S. 450, 452, 464-65 (1958).

State Regulation of Interstate Commerce

Finally, the interest of a local government in regulating activities within interstate commerce has been recognized by this Court:

> [Local laws] are to be upheld because upon a consideration of all of the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of the local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.

Parker v. Brown, 317 U.S. 341, 362-63 (1943).

Under this "sufficient tribal interest" standard, the Suquamish Tribe properly asserted its jurisdiction in the present cases. Oliphant was charged with assaulting a tribal police officer and resisting arrest. Belgarde was charged with recklessly endangering the life of a tribal police officer and injuring tribal property. Such offenses—against tribal personnel and property—are obviously subject matters in which the Tribe had sufficient interest to support its jurisdiction. In fact, no other forum manifested any interest, as evidenced by the failure to respond to the tribal request for law enforcement assistance.

5. Congress Has Confirmed by Statute the Continuing Existence of Tribal Authority Over Non-Indians.

Petitioners argue that this Court in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973) has established "federal preemption"—rather than inherent sovereignty—as the proper mode of analysis in these cases. We do not agree. In fact, in *McClanahan* (at 179) this Court confirmed that the proper analysis in cases dealing "principally with situations involving non-Indians" is that employed in *Williams v. Lee*, 358 U.S. 217 (1959). And *Williams* can scarcely be characterized as anything but a "sovereignty" case.

Futhermore, the "preemption" mode of analysis has utility *only* in cases testing the assertion of *state* power. That is, claims of state jurisdiction may be defeated on the basis of federal preemption.

It may well be, however, that a variant of "preemption" is useful in cases measuring the reach of *tribal* power. Specifically, in such cases it is of unquestionable significance that there exists a federal statutory confirmation of the tribal power. In fact, such confirmation exists in these cases.

a. Indian Reorganization Act of 1934

The Suquamish Indian Tribe is a federally recognized Indian Tribe[73] organized under the Indian Reorganization

73. Petitioners question (Pet. Br. at 28) the official status of the Suquamish Indian Tribe. However, the official status of an Indian tribe is a political question. As this Court stated:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

U.S. v. Holiday, 3 Wall. 407, 419 (1805); *United States v. Sandoval*, 231 U.S. 28, 47 (1913); *Baker v. Carr*, 369 U.S. 186, 215 (1962).

Act of 1934 (48 Stat. 984, 987, 25 U.S.C. §476) and acting under a Constitution and By-Laws approved by the Secretary of the Interior.[74]

The purpose of the Indian Reorganization Act of 1934 [hereinafter IRA] was to encourage Indian tribes to revitalize their self-government.[75] The intent of the Act was to give Indians "a chance to develop the initiative destroyed by a century of oppression and paternalism."[76]

Significantly, one of the very purposes of that revitalization was to encourage "[tribal] courts to become stronger and more highly organized."[77]

As stated in *Fisher v. District Court*, 424 U.S. 382, 390 (1976), the IRA constitutes a federal statutory confirmation of the authority and power of a tribal court:

> The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476. Consequently, it implements an overriding federal policy. . . .

Futhermore, not only the policy implemented by the Act, but also the express terms of the IRA indicate a federal confirmation of existing tribal power. This was best expressed in the authoritative Opinion of the Solicitor of the Department of the Interior issued contemporaneous with the enactment of the IRA, *Powers of Indian Tribes*, 55 I.D. 14 (1934).[78] The purpose of that Opinion was to identify

74. Appendix at 49; Exhibit 2 (in separate envelope) to Memorandum of United States as Amicus Curiae (Supp. R. 101-115).

75. *Fisher v. District Court*, 424 U.S. 382, 387 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

76. *Mescalero*, 411 U.S. at 152; H.R. Rep. No. 1804, 73rd Cong. 2nd Sess. 6 (1934).

77. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

78. Cited with approval in *Williams v. Lee*, *Id.* at 219 n.4.

those *existing* tribal powers confirmed by the Act. The Solicitor determined that Indian tribes retained a broad range of internal powers.[79] including judicial power over non-Indians:

> [S]o long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, *it might punish aliens within its jurisdiction according to its own laws and customs.* Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government. [emphasis added]

55 I.D. at 57.

b. *Indian Civil Rights Act of 1968*

Recent, and even more direct, federal statutory confirmation of tribal court jurisdiction over non-Indians is found in the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §1302. This is shown by the terms of the Act, as explained by its legislative history.

The Act was the result of several years of congressional focus on the problems facing Indian tribes and, in particular, tribal courts. Prior to passage of the Act, tribal governments were not subject to restrictions similar to the limitations on the actions of federal and state governments contained in the Bill of Rights. *Talton v. Mayes*, 163 U.S. 376 (1896). This Act extended specifically enumerated protections, akin to certain of those in the Bill of Rights, to

79. The Solicitor identified "internal" powers as those powers that are "domestic" rather than "international." 55 I.D. at 22. *See*, in particular, the discussion regarding the administration of justice 55 I.D. at 56-64.

individuals coming in contact with tribal government. In addition, it limited tribal court penalties to imprisonment for a term of six months or a fine of $500.00.

The Act was originally introduced by Senator Sam Ervin in 1965 as S. 961. It provided that Indian tribes exercising powers of self-government would be subject to the *same* limitations and restraints as those imposed on the United States by the Bill of Rights. In June, 1965, at hearings on the Bill, the Department of Interior, through Frank J. Barry, Solicitor, introduced a substitute bill which would have extended certain enumerated rights to "American Indians in their relations with their tribal governments."[80] In May, 1966, the Department of the Interior submitted supplemental testimony to the Committee and a revision of the substitute bill which had been suggested in June, 1965. The new version, along with some other changes, substituted the term "any person" for the term "American Indian" throughout the Bill:

> The revised version simplifies the appeal provisions and establishes rights for *all* persons who may be subject to the jurisdiction of tribal governments, *whether Indians or non-Indians.* [emphasis added][81]

In its recommendations[82] the Subcommittee recommended the use of the Interior Department's substitute bill in lieu of the original S. 961. The language recommended in the Interior Department's second substitute remained in the bill through passage.

80. *Constitutional Rights of the American Indian*: Hearings on S. 961 Before the Subcomm. on Const. Rights of the Senate Judiciary Comm., 89th Cong., 1st Sess. 16, 318 (June 22, 1965).

81. *Summary Report on the Constitutional Rights of American Indians*, Subcomm. on Const. Rights of the Senate Judiciary Comm., 89th Cong., 2nd Sess. 10 (1966).

82. *Id.* at 25.

Consequently, the enactment of the 1968 Indian Civil Rights Act demonstrates that: (1) Congress confirmed that Indian tribes exercise jurisdiction over non-Indians when carrying out their powers of self-government, and (2) both Indians and non-Indians now have available "sources of protection against arbitrary tribal action. . . ." *United States v. Mazurie*, 419 U.S. at 558 n.12. In fact, both the Ninth Circuit[83] in *Oliphant*, and the District Court[84] in *Belgarde* noted that, should the Suquamish Tribe, in carrying out its jurisdiction over Petitioners, violate any of the provisions of the Indian Civil Rights Act, Petitioners would have the Act's protection of habeas corpus review in federal court.[85]

6. The Suquamish Tribe's Authority Over Petitioners' Offenses Is Consonant with Contemporary Federal Indian Policy, and Was Justified By Law Enforcement Conditions on the Port Madison Reservation.

An affirmance in these cases would further a strong federal policy which seeks to encourage Indian tribes to assume their responsibilities as the local governments of their reservations. And, it is entirely appropriate for this Court to resolve the issues presented with a sensitivity to that federal policy:

> Present federal policy appears to be returning to a focus upon strengthening tribal self-government, see e.g., Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §§145 et seq.; Indian Self-Determination and Educational Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §§450 et seq., and the Court of Appeals for the Ninth Circuit has expressed the view that courts "are not obligated in ambiguous circumstances to strain

83. Appendix at 60.

84. Appendix at 117-119, 122.

85. 25 U.S.C. §1303.

> to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Santa Rosa Band of Indians v. Kings County, supra.* . . .

Bryan v. Itasca County, 426 U.S. 373, 388 n.14 (1976).

Since 1968, the United States has consistently encouraged Indian tribes to enhance and exercise their powers of self-government. Thus, the 1968 Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.*, confirmed these tribal governmental powers and at the same time established safeguards, available to Indians and non-Indians alike, against arbitrary exercise of that governmental authority.

In 1970, the President in a message to Congress[86] indicated a policy of self-determination for Indians through the strengthening of tribal government.

Furthermore, the following congressional enactments accord to tribal government the standing of "local government": Federal Property and Administrative Services Act, as amended 40 U.S.C. §483(a) (2); Federal Water Pollution Prevention and Control Act, 33 U.S.C. §§1251 *et seq.*, 1362(4); State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1227(b)(4); Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §3781(d).

Particularly significant is the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450a-450n. This Act, which has as its primary purpose the establishment of a "meaningful Indian self-determination policy" 25 U.S.C. §450a(b), contains the following congressional finding with respect to tribal authority vis a vis

86. The President's Message to the Congress of the United States, Recommendations for Indian Policy, July 8, 1970, 116 CONG. REC. 23258 (1970).

non-Indians:

> The Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

25 U.S.C. §450(a) (2).

One manifestation of this strong federal policy is of paramount importance in these cases: the financial and technical assistance given through these Acts to Indian tribal justice and law enforcement systems. As a result, tribal courts have become revitalized, tribal judges and police more intensively trained, and tribal governments more responsive to the complex needs of all reservation residents. This progress has been achieved with the support and encouragement of the federal agencies.[87]

Finally, the Suquamish Tribal Court and police have each participated in these enhancement programs. The Tribal judges and police take part in extensive educational programs and in-service training.[88] Thus, an affirmance in these cases would assist in the realization of a dynamic federal Indian policy calculated to encourage the Suquamish Tribe to assume the very responsibilities of reservation government which are involved in these cases.

Furthermore, the law enforcement conditions giving rise to these very cases confirm the soundness of this federal policy.

These cases demonstrate that but for Suquamish tribal

87. For a more extensive examination of the growth and resurgence of tribal law enforcement and justice systems, *see, Final Report of the American Indian Policy Review Commission*, Vol. 1 at 160-68 (1977); Brief of Amicus Curiae National American Indian Court Judges' Association; Brief of Amicus Curiae National Tribal Chairmen's Association.

88. This Court has in the past considered such matters as relevant to a determination of tribal court power. *Williams v. Lee*, 358 U.S. 217, 222 (1959).

jurisdiction over Petitioners' alleged offenses, persons and property on the Reservation would have gone unprotected.

After many years of ineffective federal and state law enforcement on the isolated Port Madison Indian Reservation, the Tribe found it necessary to pass a tribal code to regulate the conduct of persons within its jurisdiction. The tribal code defines as offenses acts which would ordinarily be deemed petty offenses or misdemeanors in other jurisdictions. Furthermore, in accordance with 25 U.S.C. §1302 (7), penalties are limited to the maximum of six months imprisonment and/or a $500.00 fine.

When the Tribe planned its annual Chief Seattle Days Celebration, it expected thousands of people to congregate in a small area on the Tribal Encampment Grounds for the Celebration. Requests were made of state, county, and federal law enforcement officials for law enforcement assistance. The Tribe was told that it would have to provide its own law enforcement out of tribal funds with tribal personnel. Therefore, when Petitioner Oliphant allegedly committed his offense at 4:30 a.m., the only law enforcement officers available to deal with the situation were tribal deputies. Without the exercise of jurisdiction by the Tribe, there would have been no law enforcement whatsoever on the Reservation during this major gathering, clearly creating a danger to public safety.

Petitioner Belgarde's alleged offense also occurred during the night. There was a similar lack of law enforcement assistance from other jurisdictions. If tribal members cannot be protected from such offenders, there will be a powerful motivation for such tribal members to leave the reservation, thereby counteracting the express congressional

policy of improving the quality of reservation life.

Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated.[89] Federal prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses in courts in which the dockets are already overcrowded, where litigation will involve burdensome travel to witnesses and investigative personnel, and where the case will most probably result in a small fine or perhaps a suspended sentence.

Prosecutors in counties adjoining Indian reservations are reluctant to prosecute non-Indians for minor offenses where limitations on state process within Indian country may make witnesses difficult to obtain, where the jurisdictional division between federal, state and tribal governments over the offense is not clear, and where the peace and dignity of the government affected is not their own but that of the Indian tribe.

Without tribal law enforcement, traffic offenses, trespasses, violations of tribal hunting and fishing regulations, disorderly conduct and even petty larcenies and simple assaults committed by non-Indians go unpunished. The dignity of the tribal government suffers in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior necessarily follows. With the increased travel and involvement of non-Indians on Indian reservations, any impediment to full tribal jurisdiction within its own territory is intolerable.

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89. *See* Vollmann, *Criminal Jurisdiction In Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 Kan. L. Rev. 387 (1947); Brophy and Aberle, *The Indian: America's Unfinished Business* 50 (1966).

7. The State of Washington Does Not Have Exclusive Jurisdiction Over Petitioners' Offenses.

Petitioners claim that if the Tribe once had jurisdiction over offenses such as theirs, concurrent with general federal criminal jurisdiction, nevertheless, such tribal jurisdiction was terminated by Washington's assumption of exclusive jurisdiction pursuant to Public Law 83-280, 66 Stat. 588 (1953) [hereinafter P.L. 280].[90]

On the other hand, we contend as follows:

a. The State has not validly assumed *any* P.L. 280 jurisdiction due to its failure to properly amend its Constitution. If this Court agrees, that ends the matter.

b. Furthermore, any P.L. 280 jurisdiction that the State may have initially assumed on the Port Madison Reservation was reduced from total to partial jurisdiction through retrocession.

c. But, such partial jurisdiction could not have been valid since either:

(1) P.L. 280 itself does not permit a partial jurisdiction; or

(2) Partial jurisdiction is a denial of equal protection

90. In 1957, (Wash. Laws of 1957, ch. 240, App. Pet. Brief at 19a) the state of Washington provided for total assumption of civil and criminal jurisdiction over Indian reservations, with the consent of the tribal government involved. In 1963, (Wash. Laws of 1963, ch. 36, RCW 37.12.010, App. Pet. Brief at 20a) the state enacted an additional statute providing for assumption of jurisdiction, irrespective of tribal consent, but with the following exemption: "Indians when on their tribal lands or allotted lands" on reservations, provided this exemption would not apply in eight specifically enumerated subject matters.

In 1958, the Suquamish Tribe consented to the "total" assumption of jurisdiction under the 1957 statute. In 1972, the Governor, at the request of the Tribe, retroceded to the United States all but the "partial" jurisdiction assumed under the 1963 statute.

of the laws.[91]

d. Even if valid, that partial jurisdiction, by definition, would cover Belgarde, but not Oliphant.

e. Finally, the above four questions need not be answered since any P.L. 280 jurisdiction to which Petitioners are subject would be, at most, concurrent with tribal jurisdiction.[92]

a. *All State P.L. 280 Jurisdiction Is Invalid*[93]

Prior to enactment of P.L. 280, Washington was organically precluded from assuming any Indian jurisdiction by virtue of the Enabling Act, 25 Stat. 676, §4 and the disclaimer in the Compact in art. 26, Section Second of the State Constitution. Each of these prohibited State Indian jurisdiction until (1) Indian title was extinguished and (2) Congress consented to state Indian jurisdiction.

Since in 1953 much Indian land remained in trust, Congress added §6 of P.L. 280 to authorize the eight states, including Washington, with such constitutional impediments to assumption of Indian jurisdiction, to assume Indian jurisdiction without extinguishment of Indian title, *provided* each state first amend its constitution to eliminate the disclaimer of Indian jurisdiction.

91. The State partial assumption statute, RCW 37.12.010, was held invalid on this ground in *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 552 F.2d 1332 (9th Cir. 1977). The case is on appeal to this Court, but the Court has taken no action with regard to that appeal at this time.

92. Respondents adopt *in toto* in support of sections a and c, *infra* the detailed arguments demonstrating the invalidity of Washington's assumption of P.L. 280 jurisdiction contained in the Brief of Amici Curiae Confederated Tribes of the Colville Indian Reservation, Washington, and Makah Indian Tribe of the Makah Indian Reservation, Washington, filed herein. Brevity demands that the detailed analysis be omitted here but rather adumbrated in summary fashion.

93. This is only a summary of this argument. *See* note 92, *supra*.

The sponsors of P.L. 280, testimony in congressional hearings and on the Senate floor, and the Senate and House reports which accompanied the Act (H.R. 1063), unanimously agreed that §6 governed Washington and required amendment of the State Constitution. And it is beyond cavil that P.L. 280 means what Congress intended it to mean. *Jones v. Guaranty & Indemnity Company,* 101 U.S. 622 (1879).

However, the Washington legislature attempted to assume Indian jurisdiction first through ch. 240, Laws of 1957 and later through ch. 36, Laws of 1963, *without* the prescribed constitutional amendment. Since §6 specifically provided that:

> The provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be . . .

Washington could not, as a matter of federal law, assume any Indian jurisdiction under P.L. 280.

Both the Washington Supreme Court and the Ninth Circuit Court have attempted to avoid this conclusion. In *Makah Indian Tribe v. Washington,* 76 Wn.2d 485, 457 P.2d 590 (1969), the Washington court held that the requirement in §4 of the Enabling Act and art. 26 of the State Constitution making the disclaimer irrevocable without the consent of the people of the State was equivalent to a requirement of consent of the people of the state "speaking through the legislature." And in *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 648 (9th Cir. 1966), the Ninth Circuit Court held that §6 of P.L. 280 required only that the constitutional disclaimer be removed in some way

which would be valid and binding under State law.

The reasoning of those two holdings is patently specious. An analysis of §4 of the Enabling Act makes very clear that the Compact is between the federal government and the people of the State and requires the consent of the people as opposed to the consent of the legislature. Further, in the Hearing on H.R. 1063 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representative, 83rd Congress, 1st Sess. (June 24, 1953), Rep. Wayne Aspinall, referring to elimination of the disclaimer in the compacts, laid the matter to rest once and for all by stating:

> The State Legislature would not do it. The people of the state themselves would have to do it.

Subcommittee Hearing on H.R. 1063 at 24.

Moreover, this Court has made it clear that a state may not assume Indian jurisdiction except upon strict compliance with the applicable provisions of P.L. 280 in *Kennerly v. District Court of the Ninth Judicial District of Montana,* 400 U.S. 423, 427 (1971):

> *[N]or was the requirement of affirmative legislative action an idle choice of words. . .*
>
> [O]ur conclusion as to the intended governing force of §7 of the 1953 Act is reinforced by the *comprehensive and detailed congressional scrutiny* manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country. [emphasis added]

Furthermore, in the more recent case *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 177-78 (1973) this Court stated:

> [T]he Act expressly provides that the State must act "with the consent of the tribe occupying the particular

> Indian country," 25 U.S.C. §1322(a), . . . *and* must "appropriately [amend its] constitution or statutes." 25 U.S.C. §1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. *But we cannot believe that Congress would have required* the consent of the Indians affected and *the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See Kennerly v. District Court,* 400 U.S. 423 (1971). [footnotes omitted] [emphasis added]

Importantly, §1324, which this Court referred to as a "statutory imperative," is a re-enactment of §6 of P.L. 280.

b. *Retrocession of Jurisdiction*

In 1958, the Suquamish Tribe requested the State to assume total jurisdiction over the Reservation.[94] However, with the growth of the Indian self-determination movement in the 1960's and the failure of the State to provide adequate law enforcement, the Tribe realized its mistake and requested the Governor to retrocede criminal and civil jurisdiction to the United States. On August 26, 1971, Governor Daniel J. Evans proclaimed that retrocession,[95] which was accepted on April 14, 1972, by the United States. This acceptance was published, in accordance with the terms of 25 U.S.C. §1323, the retrocession statute. 37 F.R. 7353 (1972).[96]

Subsequently, the Attorney General of the state of Washington opined that: (1) the Governor could perform only *limited* ministerial functions with regard to the proclamation or retrocession of jurisdiction, (2) the Governor lacked

94. App. Pet. Brief at 58a-59a.
95. App. Pet. Brief at 63a.
96. App. Pet. Brief at 64a.

authority to retrocede jurisdiction, and (3) that such action would have to be taken by the Legislature.

But, in *State v. Bertrand,* 61 Wn.2d 333, 378 P.2d 427 (1963), the Washington State Supreme Court held that the governor's function in proclaiming jurisdiction over an Indian reservation was not purely "ministerial" and involved the exercise of his executive discretion. Therefore, having such executive discretion, the governor cannot be said to have exhausted his power when he performs the initial discretionary act of proclaiming jurisdiction. The power to grant recognition must carry with it the power to subsequently withdraw it on reconsideration. Where an Indian tribal government has changed its views and desires, and makes these changes known to the governor, who agrees, the governor must be able to reconsider his original proclamation and retrocede jurisdiction, if he feels this would be in the best interests of the tribe and the State.

In any event, this Court need not determine these state law issues, since once the United States officially accepted the retrocession, it was valid and binding.

In *Omaha Tribe of Nebraska v. Walthill,* 334 F. Supp. 823 (D. Neb. 1971), *aff'd.,* 460 F.2d 1327 (8th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973), the Court held that a retrocession of jurisdiction made under procedures admittedly invalid under state law was nevertheless valid and binding upon acceptance by the Secretary of the Interior. The Court concluded that the state of Nebraska failed to follow its own legal procedures, but that the important question was whether the state resolution was valid under federal law, not state law. In so holding, the Court noted that the Secretary of the Interior was not authorized to

investigate the procedural or technical validity of every notice he received:

> [O]nce the Secretary received from the state officials what appeared to be an official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute.

334 F. Supp. at 832.

Such an analysis was employed in *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971). The Court concluded:

> The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action, are all factors to be considered and lead the Court to the conclusion that the federal interpretation of the effectiveness of state action triggering the reassertion of federal jurisdiction is and was controlling.

334 F. Supp. at 541.

The Court in *United States v. Brown* cited *Leser v. Garnett*, 258 U.S. 130 (1922), in which this Court determined the significance of the invalidity under state law of two state legislature ratifications of the Nineteenth Amendment. In *Leser* this Court held that once the Secretary of State was officially notified of the state ratifications, it was conclusive upon him, and, being certified to by his proclamation, was conclusive upon the courts.

In our case, the Governor's proclamation of retrocession was accepted in behalf of the United States by the Secretary of the Interior. The Secretary was authorized to accept such a retrocession of state jurisdiction by Executive Order

No. 11435,[97] in accordance with 25 U.S.C. §1323. That statute provided that acceptance of retrocession would be effected by publication of notice thereof in the Federal Register. In accordance therewith, Notice of Acceptance of Retrocession of Jurisdiction for the Port Madison Reservation was published in the Federal Register on April 13, 1972. 37 F.R. 7353.[98] With this acceptance, the requirements of federal law were met, and the retrocession was accomplished, notwithstanding any possible invalidity under state law of the governor's action.

Finally, the effect of this retrocession (by its own terms) was to reduce the Port Madison Reservation from total to partial P.L. 280 jurisdiction.

c. *Partial State P.L. 280 Jurisdiction Is Invalid*[99]

(1) Partial State P.L. 280 Jurisdiction Violates P.L. 280

Washington's attempted assumption of P.L. 280 jurisdiction purports to establish a scheme of *partial* jurisdiction. However, P.L. 280 granted California, Minnesota, Nebraska, Oregon and Wisconsin *total* civil and criminal Indian jurisdiction, providing that "the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State" and "those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." The *only* partial aspect of P.L. 280 was that three Indian tribes were exempted. Otherwise P.L. 280 decidedly did not authorize a partial

97. November 21, 1968, 33 F.R. 17339.
98. App. Pet. Brief at 64a.
99. This is only a summary of this argument. *See* note 92, *supra*.

assumption of Indian jurisdiction.

In contrast, the Indian Civil Rights Act of 1968, P.L. 90-284 (25 U.S.C. §§1301-1302 and §§1321-1326) provides specifically that with the consent of the affected Indian tribes a state may assume jurisdiction over *all or any* criminal offenses and *all or any* civil causes of action within *all or any* area of Indian country. Again Rep. Aspinall explained these provisions would substantially amend P.L. 280 by permitting states to assume *partial* Indian jurisdiction.

(2) Partial State P.L. 280 Jurisdiction is Invalid as a Denial of Equal Protection of the Laws.

Washington's particular pattern of Indian jurisdiction is based upon an arbitrary and indefensible territorial assumption, namely, that state Indian jurisdiction is important on non-trust land but not important on trust land. For example, the State's jurisdiction on the Port Madison Indian Reservation is total on non-trust land but limited on trust land to eight subject matters: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads and highways.

This jurisdictional tangle makes acts occurring on non-trust land subject to state jurisdiction but leaves those occurring on trust land subject to tribal or federal jurisdiction. But subjecting criminal defendants or parties to civil litigation to different courts, rules of procedure and substantive law on the random basis of land title cannot possibly serve a justifiable state governmental objective. Respondents concur with the conclusion of the Ninth Circuit

Court of Appeals which struck down the Washington statute in *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 522 F.2d 1332, 1336 (9th Cir., 1977):

> This checkerboard jurisdictional structure based on a selection by land title is the "very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ." Accordingly, the partial territorial assumption of criminal jurisdiction under R.C.W. §37.12.010 is a denial of equal protection.

d. *No State Jurisdiction Over Oliphant*

Petitioners contend that under the Washington partial assumption law, RCW 37.12.010, the State has jurisdiction over the offenses allegedly committed by both Petitioners. If this statute were valid, concededly the State would have jurisdiction over the offenses allegedly committed by Belgarde, as they occurred on non-trust lands. However, since Oliphant's alleged offenses were committed on tribal land, they fall within the below quoted exemption in the state statute.

That exemption is set forth in RCW 37.12.010:

> [S]uch assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands. . . .

Petitioners argue that this exception covers only offenses committed *by* Indians, and not offenses committed *against* them.

However, RCW 37.12.030 states:

> Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed *by or against Indians* in the lands prescribed in RCW 37.12.010. . . . [emphasis added]

The statute is therefore clear: the assumption of jurisdiction effected by RCW 37.12.010 covers offenses committed by Indians and offenses perpetrated against Indians. That is, "Indians" as used in RCW 37 12.010 includes Indian offenders and Indian victims. Therefore, the term "Indians" in the above quoted exemption language of RCW 37.12.010 must also include Indian offenders and Indian victims. Accordingly, Oliphant's alleged offense—involving an Indian victim and occurring on tribal land—falls within the exemption.

This interpretation is supported by well-established doctrines of statutory construction. Statutory provisions which are part of the same act—such as §.010 and §.030—are *in pari materia* and should be construed in their entirety. 73 Am. Jur. 2d *Statutes* §§187-191.

In addition, P.L. 280 itself provided for state assumption of jurisdiction "over offenses committed by or against Indians in the areas of Indian country . . ." and RCW ch. 37.12 was enacted under P.L. 280. Therefore, the two statutes should be interpreted in harmony. 73 Am. Jur. 2d *Statutes* §193. Accordingly, it must be assumed that all areas of jurisdiction taken by the state match those described in P.L. 280. Finally, this interpretation would accord with the established policy of construing statutes in favor of federal jurisdiction. *See Rice v. Olson*, 324 U.S. 786, 789 (1945).

e. *Any State Jurisdiction Is Concurrent With Tribal Jurisdiction*

In any event, if this Court were to hold that the State has P.L. 280 jurisdiction over Petitioners' offenses, tribal jurisdiction over these offenses would still not be defeated.

Respondents contend that any jurisdiction assumed by the State is, at most, concurrent with tribal jurisdiction.

The Terms and Legislative History of P.L. 280

There is nothing in the terms or legislative history of P.L. 280 indicating a congressional intent to extinguish tribal jurisdiction. In fact, it is evident, from the committee reports,[100] that the purpose of the legislation was merely to substitute state jurisdiction for the existing federal jurisdiction.

As the committee reports show, tribal courts were not functioning effectively at the time of the passage of P.L. 280. Thus the burden of law enforcement in Indian country was in fact falling on the concurrent[101] federal jurisdiction. As a result, federal courts and prosecutors were highly desirous of ridding themselves of the complex problems of law enforcement on Indian reservations. It was this pressure to which Congress was responding; the concurrent tribal jurisdiction was ignored.

Therefore, it was only the concurrent federal jurisdiction that P.L. 280 was purporting to transfer to the State. And, of course, Congress, without appropriate *express* language, could not have transferred any more than its own share of the concurrent jurisdiction. P.L. 280 is a statute passed for the benefit of Indian tribes which is to "to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Furthermore, as *Bryan* states (at 393), whether a tribal power had been terminated under P.L. 280—"an

100. H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953); S. Rep. No. 699, 83rd Cong., 1st Sess. (1953).

101. As demonstrated at §2, *supra* federal and tribal criminal jurisdiction are concurrent.

ambiguous statute"—is to be determined under the standards applied to "termination" acts:

> "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the . . . Act. This being so, we are not inclined to infer an intention to terminate. . . . A congressional determination to terminate must be expressed on the fact of the Act or be *clear* from the surrounding circumstances and legislative history." [citation omitted] [emphasis added.]

Yet, the statute does not contain any language purporting to extinguish tribal jurisdiction; nor does the legislative history.

Finally, this result is supported by the provision of the Indian Civil Rights Act of 1968[102] authorizing retrocession of a state's P.L. 280 jurisdiction. If P.L. 280 extinguished tribal powers, then such a retrocession would restore such powers. Yet, while the 1968 Act inserted the requirement of tribal consent for future state assumptions of P.L. 280 jurisdiction,[103] it did not include a tribal consent requirement in the case of future retrocessions of P.L. 280 jurisdiction. But, if it were true that retrocession would restore tribal jurisdiction, one would think that the 1968 Congress —which was exhibiting exceptional deference to the views of affected tribes[104]—would naturally have required a tribal consent to retrocession. It is accordingly logical to conclude that Congress did not view retrocession as restoring to tribes a previously taken jurisdiction.

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102. 25 U.S.C. §1323.

103. 25 U.S.C. §§1321, 1322.

104. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 550 (1975) [hereinafter cited as Goldberg (1975)].

The 1970 Amendment of P.L. 280

Petitioners assert that a 1970 amendment of P.L. 280 (84 Stat. 1358, 18 U.S.C. §1162(a), (c)) supports the proposition that tribal jurisdiction is not concurrent with state P.L. 280 jurisdiction. However, the legislative history does not support Petitioners' claim.

The 1970 amendment was introduced at the request of the Metlakatla Indian Community and the State of Alaska.[105] It was sought for the limited purpose of clarifying—as to the isolated Metlakatla Reservation *only*—the question of whether Alaska's P.L. 280 jurisdiction was concurrent with tribal jurisdiction. Thus, the 1970 amendment was enacted for the purpose of making clear that concurrent tribal and state jurisdiction existed on that reservation. Decidedly, it was not introduced to *create* or otherwise *establish* the tribal jurisdiction, but rather to *confirm* it. Therefore, it cannot properly be inferred that tribal jurisdiction does not exist on all *other* P.L. 280 reservations. In fact, that question was not before Congress, and the legislative history reveals no analysis of this general question.

The 1970 amendment also added the following language to the existing statute:

> The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as *areas over which the several States have exclusive jurisdiction.* [emphasis added]

At first blush, one might conclude that the emphasized language confirms the *absolute* exclusivity of state juris-

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105. 1970 U.S. Code Cong. and Adm. News 4783.

diction. However, the legislative history reveals that this language was intended merely to confirm that state jurisdiction exists exclusive of *federal* jurisdiction *only*. In a letter to the House Judiciary Committee, the principal sponsors indicated the intent of this language:

> The additional language is descriptive only, and is not meant to change the meaning of 1162(c). It was added because subsection (c) refers to the "Indian country listed in subsection (a)" and that list includes Indian country not under state jurisdiction, as well as areas that are. Obviously sections 1152 and 1153 are meant to apply to the former category. The additional language is not intended to have any bearing on actual or potential arrangements between states and the tribes with respect to the allocation of law enforcement responsibility between them.
>
> While the additional language is perhaps unnecessary, it was added for purposes of clarity.[106]

In commenting on this amendment, Rep. Donahue further noted that the change would not affect "whatever inherent jurisdiction particular tribes may have retained."[107] These comments indicate that the amendment was not meant to affect any inherent jurisdiction that the tribes possessed, but rather to clarify the relationship between the state and the federal government in states which had assumed P.L. 280 jurisdiction.

Originally, the Department of the Interior had recommended that the amendment be deleted from the Bill. Significantly, however, following the above quoted letter of the sponsors, the Department withdrew its objection. In

106. Letter to the House Judiciary Committee, October 14, 1970, 116 Cong. Rec. 37354-55 (1970).

107. 116 Cong. Rec. 37354 (1970).

a letter from the Assistant Secretary of the Interior[108] the Department stated that, given the understanding of the amendment expressed in the earlier letter from the sponsors:

> which we interpret to mean that the amendatory language will have no effect on whatever inherent jurisdiction particular Indian Tribes may have retained in states which have assumed jurisdiction pursuant to [Public Law 280] . . . we would not object to the enactment of the measure.

An Exclusive State P.L. 280 Jurisdiction Would Undermine Tribal Government

While *Bryan v. Itasca County* dealt with the imposition of state taxation, a *civil* matter, we submit that this Court's analysis in that case is equally applicable in an assessment of P.L. 280's consequences vis a vis tribal *criminal* jurisdiction:

> [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than " 'private, voluntary organizations,' " United States v. Mazurie 419 U.S. 544, 557 (1975). . . .

Bryan, 426 U.S. at 388.

Assuredly, an interpretation that P.L. 280 extinguished tribal criminal jurisdiction *would* "result in the undermining or destruction" of tribal governments. Consider that a state's P.L. 280 jurisdiction ordinarily covers all persons—Indian and non-Indian—within Indian country. There-

108. Letter from Harrison Loesch, dated November 10, 1970, reprinted in 116 Cong. Rec. 37355 (1970).

fore, if P.L. 280 jurisdiction were to oust tribal jurisdiction, a tribe would lack jurisdiction even over *its own members.* Certainly, such a construction of P.L. 280 "might relegate tribal governments to a level below that of countries and municipalities, thus essentially destroying them," a result which *Bryan* (at 388n.14) would firmly reject.

Furthermore, it has been held that the substantive state law applicable to Indian reservations under P.L. 280 does not include laws and ordinances of counties and municipalities. *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975) *cert. denied,* ..... U.S. ....., 97 S. Ct. 51 (1977). Therefore, without tribal law, the entire range of on-reservation conduct of the type ordinarily governed by county and municipal law would go unregulated.[109]

Moreover, *Bryan* (at 388 n.14) endorses the view that where ambiguous, P.L. 280 may be interpreted in harmony with prevailing federal Indian policy. Since, as discussed in section 6, *supra,* there exists presently a strong federal policy favoring the strengthening of tribal government, P.L. 280 should be interpreted as not impairing the inherent criminal jurisdiction of tribal government.[110]

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109. *See* Goldberg (1975), *supra* note 104 at 580-83.

110. This is the view of a noted commentator on P.L. 280 jurisdiction as well:

> [I]t is fair to say that given current federal policy encouraging stronger tribal governments and increased federal efforts to mitigate the offensive aspects of tribal autonomy within state boundaries, [footnote omitted] P.L. 280 should be interpreted to limit state jurisdiction where that is consistent with the often ambiguous language and legislative history.

Goldberg (1975), *supra* note 104 at 594.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgments of the courts below should be affirmed.

BARRY D. ERNSTOFF
208 Pioneer Building
600 First Avenue
Seattle, Washington 98104
Counsel for Respondents

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT
By STEVEN H. CHESTNUT
Of Counsel

October 29, 1977

APPENDIX A

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

To all to whom these presents shall come, Greeting:

By virtue of the authority vested in me by the Administrator of General Services, I certify on his behalf, under the seal of the United States General Services Administration, that the attached reproduction(s) is a true and correct copy of documents in his custody.

SIGNATURE: Phillip E. Lothyan	
NAME: PHILLIP E. LOTHYAN	DATE: 10/19/77
TITLE: Chief, Archives Branch	
NAME AND ADDRESS OF DEPOSITORY: Federal Archives & Records Center, GSA 6125 Sand Point Way, NE Seattle, WA 98115	

GSA DC 66-13478

GSA FORM 6791E

Department of the Interior,
Office Indian Affairs.
August 30th 1854.

Sir:

By requisition of this Office of the 12th instant, the sum of $10,000 will be placed in your hands, or remitted to you from the appropriation of $45,000 made by the act of Congress approved July 31st 1854, "for expenses of negotiating treaties with and making presents of goods and provisions to Indian Tribes in the Territory of Washington."

It is the expectation of the Department that the sum appropriated will prove sufficient to defray all expenses incurred in and incident to making conventional arrangements designed to be permanent, with all the Tribes and fragments of Tribes within your Superintendency, by which the United States will extinguish their claim of title to all the lands within the Territory, excepting such limited districts as it may be necessary to assign them for their occupancy in future; and I have now to inform you that you have been designated by the President as the Officer of the Indian Department to conduct the negotiations and conclude the treaties of amity and acquisition that are thus provided for.

The remittance of $10,000 above referred to, was made to enable you

to enter upon the discharge of the duty hereby assigned you, as soon as you arrive in Washington Territory, and the funds will be applicable for the purchase of presents of goods and provisions, and for defraying all expenses of a preliminary and incidental nature connected with the negotiations &c.

In accordance with the request made in your letter of the instant, I have directed the articles of Dry Goods and Hardware embraced in the schedules therewith furnished by you, to be procured from the Contractors with this office for Indian Goods, and it is expected that the two lots, one of $8000 in value, and one of $12,000 will be shipped from New York to San Francisco by fast sailing Clipper Ship, in a few days, to be forwarded to you, as you requested, $8000 to Columbia Barracks, care of the U. S. Quartermaster, and $12,000 to Olympia. Schedules of the goods thus procured, will be transmitted to you at Olympia, and as they will be shipped to the care of the Collector at San Francisco, you will correspond with him as to the more safe, speedy & proper way of lending them thence to their respective destinations.

In concluding articles of agreement and convention with the

BEST COPY AVAILABLE

Indian Tribes in Washington Territory, you will endeavor to reunite the numerous bands and fragments of tribes into tribes, and provide for the concentration of one or more of such tribes upon the reservation which may be set apart for their future homes.

The formation of distinct relations with each of the forty or fifty separate bands of Indians in Washington Territory, would be as likely to promote the best interests of the White settlers or of the Indians, as if the latter could be concentrated on a limited number of reservations, or on contiguous reservations in a limited number of districts of country apart from the settlements of the Whites.

Unless some such arrangement can probably be effected, you will at present conclude treaties with such tribes or bands only, as are located immediately adjacent to the settlements of the Whites, and between whom and our own citizens animosities prevail, or disturbance of the peace are reasonably apprehended. And in entering upon the execution of the duty with which you are hereby charged, you will turn your attention first to such tribes and bands.

It is desirable also that the stipulations to be fulfilled annually on the part of the United States, be few

in number, and that the Department retain the authority to apply the funds to a variety of objects, such as the circumstances of the Indians at the time of payment may require.

This suggestion you will regard, particularly if you are unable to effect the combination of all the Bands into six or eight Tribes, or to arrange half a dozen treaties or less, so that every one of the tribes shall be a party to one of them.

It is not deemed necessary to give you specific instructions as to the details of the treaties. I however enclose to you herewith, a copies of the treaties recently concluded by Supt. Palmer, at Table Rock & Cow Creek, Oregon Territory, with the Rogue River & Cow Creek Indians and also printed copies of treaties lately concluded at this city with the Omaha & Ottoe & Missouria Indians.

These negotiated by Supt. Palmer are regarded as exhibiting provisions proper on the part of the Government & advantages to the Indians, and will afford you valuable suggestions. Those with the Omahas & Ottoes & Missourias, will indicate the policy of the Government in regard to the ultimate civilization of the Indian Tribes, the graduation of annuity payments secured to them, the encouragement of

of Schools and Missions among them, the exclusion of Ardent Spirits from their settlements — the security to be given against the application of their annuity funds for payment of debts and claims; the terms on which roads & rail-roads may be constructed through their reservations, and the authority proper to reserve to the President, of determining the manner in which annuities of Indians shall be applied for their benefit.—

I would here remark, that the amounts secured to Tribes in Nebraska will not be a criterion for you, in regard to the amount of the annual or other payments to be made to Tribes in Washington, under stipulations of the proposed Treaties, in as much as the former held ~~grants of land set off by meters and bounds, and the~~ lands which had become valuable by reason of their proximity to the State of Iowa, whilst the latter have claims of title based on occupancy alone, and that occupancy of a nature not fixed, and well defined as to boundaries, and the lands which they claim are far removed from the portions of the country which have been long settled, & highly improved and cultivated.

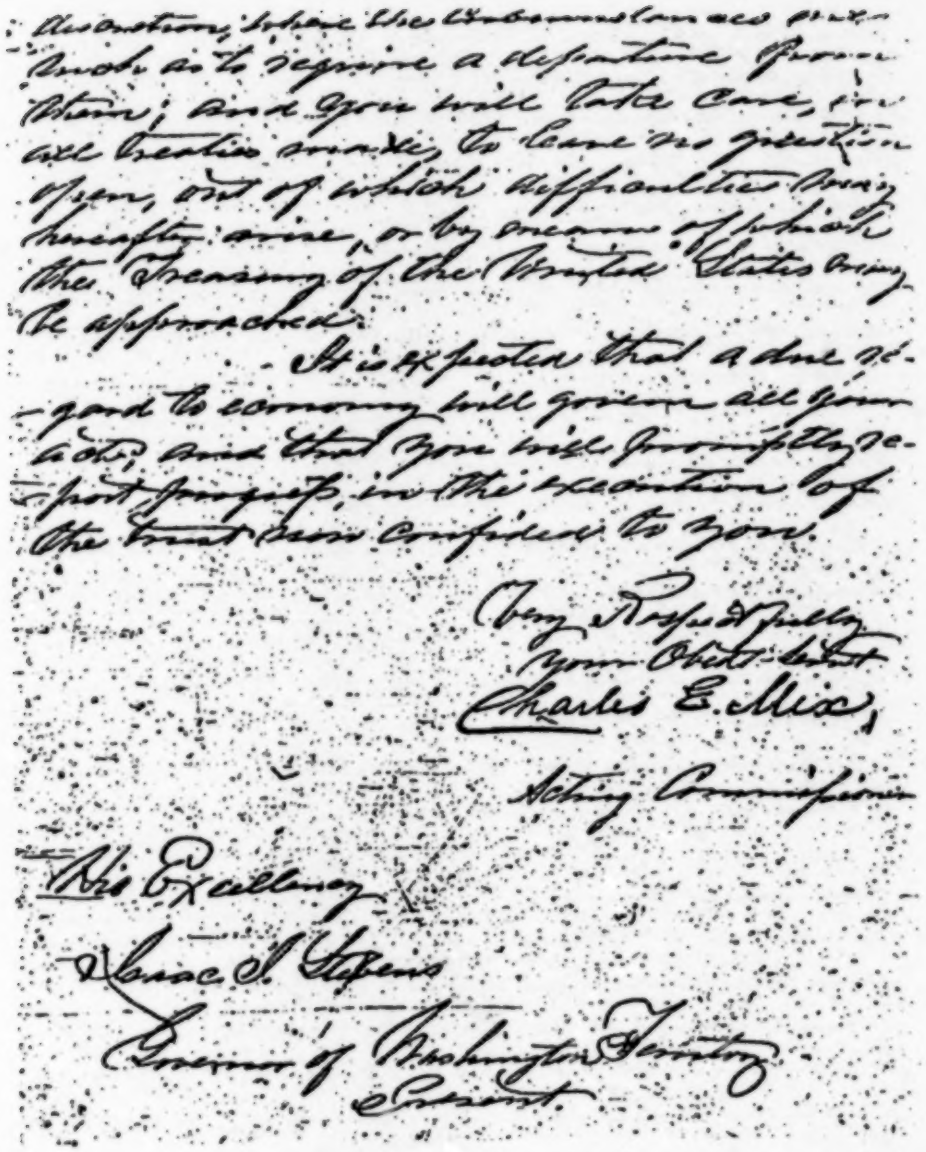
I would also refer you to the late annual report of this Office, and the last annual report of the

Secretary of the Interior, from which you will perceive that it is regarded by the Department as the best policy to avoid, as far as it can be judiciously done, the payment of Indian annuities in money, and to substitute implements of agriculture, stock, goods, and articles necessary to the comfort and civilization of the Tribes.

You will bear in mind the distance that separates you from the Capital, and the time which must elapse from the negotiation of treaties until you hear of the action of the President and Senate upon them; and you will hence caution the Indians against expecting the first payments of annuities too soon after the conclusion of negotiations.

You will at your early convenience, furnish to this Office a Skeleton Map of Washington Territory, showing the location of the different tribes and bands, and the boundaries of the regions respectively claimed by each; and as treaties are concluded from time to time, in your reports accompanying them, furnish a description of the reservation provided for the occupation of the Indians, with such precision, that it may be marked on the map here.

With these general views, you will nevertheless exercise a sound



question, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached.

It is expected that a due regard to economy will govern all your acts, and that you will promptly report progress in the execution of the trust now confided to you.

Very Respectfully
Your Obdt Servt
Charles E. Mix
Acting Commissioner

His Excellency
Isaac I. Stevens
Governor of Washington Territory
Present

Department of the Interior
Office of Indian Affairs
August 30, 1854

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The remittance of $10,000 above referred to, was made to enable you to enter upon the discharge of the duty hereby assigned you, so soon as you arrive in Washington Territory, and the funds will be applicable for the purchase of presents, of goods and provisions, and for defraying all expenses of a preliminary and incidental nature connected with the negotiations.

In accordance with the request made in your letter of the instant, I have directed the articles of Dry Goods and Hardware embraced in the schedules therewith furnished by you, to be procured from the contractors with this office for Indian Goods, and it is expected that the two lots, one of $8,000 in value, and one of $12,000 will be shipped from New York to San Francisco by fast sailing Clipper ship, in a few days, to be forwarded to you, as you requested; $8,000 to Columbia Barrack, care of the U.S.

Quartermaster, and $12,000 to Olympia. Schedules of the goods thus procured will be transmitted to you at Olympia, and as they will be shipped to the care of the Collector at San Francisco, you will correspond with him, as to the more safe, speedy, and proper way of landing them thence to their respective destinations.

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I would also refer you to the late annual report of this Office, and the last annual report of the Secretary of the Interior, from which you will perceive that it is regarded by the Department as the best policy to avoid, as far as it can be judiciously done, the payment of Indian annuities in money, and to substitute implements of agriculture, stock, goods, and articles necessary to the comfort and civilization of the Tribes.

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With these general views, you will nevertheless exercise a sound discretion, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached.

It is expected that a due regard to economy will govern all your acts, and that you will promptly report progress, in the execution of the trust now confided to you.

Very Respectfully
Your Obedt Servt
Charles E. Mix,
Acting Commissioner

His Excellency
Isaac I. Stevens
Governor of Washington Territory
Present.

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

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SIGNATURE: Phillip E. Lothyan
NAME: PHILLIP E. LOTHYAN
DATE: 10/19/77
TITLE: Chief, Archives Branch
NAME AND ADDRESS OF DEPOSITORY: Federal Archives & Records Center, GSA
6125 Sand Point Way, NE
Seattle, WA 98115

GSA DC 80-13478

GSA FORM 6791E

Records of the proceedings of the Commissioners
to hold Treaties with the Indian Tribes in Washington
Territory and the Blackfoot Country

Olympia W.T. Dec 7th

Gov. I. I. Stevens, the Commissioner
appointed by appointing James McClellan Secretary,
C. H. Mallet, Surveyor, H. D. Cleveland Secretary; and
Col. Shaw, Interpreter.

Lt. W. T. Simmons, Special Agent for the Nisqually
District, was present.

The Commissioner read a letter addressed by him to the
Secretary of the Interior enclosing Charges preferred against Mr. T.
Simmons Special Agent, & containing extracts from a letter from
Hon. Chas. Mason Chief Justice of this Territory, in which
which the said charges were completely denied and
refuted. The letter was ordered to file.

The Commissioner spoke of general objections among the Indian
Tribes in Washington Territory & the necessity of speedily en-
deavoring to settle with them & ascertaining their Reservations.

The Secretary then read treaties lately concluded by
the Board of Indian affairs with the Otoe Missouria Iowas and
the Omahas, and their provisions were fully discussed and
the purpose for treaties with Tribes West of the Cascades
mountains was considered.

After considerable discussion upon Reservations, Rivers
Stations, Forts, Schools &c. the Commissioner directed Mr.
G. Gibbs to prepare a Programme of the Treaty in accor-
dance with the views of the Commissioner.

The question of employing a Secretary Salaried for the
use of the Commissioner and translations of Indian Treaties
came up, & it was decided to employ such Secretary at
$700 per annum and entered by the Comm.

The Commissioner then adjourned to Dec 10th

Dec 10th

The Commissioner met & duly Organized.

Mr. Gibbs presented the written Draft of a Treaty which after
discussion and slight modifications was adopted as the
basis of the Treaties to be held with the Indian tribes upon the
Sound near the Straits of Juan de Fuca as follows.

It is proposed that on the 20th inst. the first
treaty will be commenced to be held at the Point
of the Nisqually on the 24th inst. As the ostensible
general purpose of the assembly to be explained to the Indians
is to settle their titles. The treaties to be signed on and for

of the Sound Indians to be the medium that he may address
and consult the Treaty. He to read and address and
point to be then given.

The first party to be composed of Indians from Sinnahomish
Territory to the Puyallup & Nisqually Hoods Canal, as
Reserves will be located there. Then the Duwamish and
so on down the Sound to Bellingham Bay & the Straits
Subsequently by land the Lower Cowlitz Country and
Columbia River.

Heads of Proposed Treaties.

Art. I. The following named Tribes and Bands cede to the
United States all their lands and interests &c.

Art. II. There is hereby secured to the use of said Tribes the
following tracts viz:

The right of fishing at Commonplaces & customary places
is also the right to Hunt, Pasture upon all open and
Unclaimed

May be required from our Reservation to another or
for purposes of improvement Head of Council

Art. III. The Tribes agree to remove to and settle on the afore-
said Reserved within one year after ratification of the Treaty, or
sooner if means are furnished them.

Art. IV. In consideration of the cession the United States agrees to
pay the said Tribes &c. the sums of $ (Rate $10. for
Chief - $7.50 for Sub Chief - $5. for Villagers) to be paid as
annuities and allowed as accruing at the rate of 5 per cent per
annum. NOTE The same Calculation on this principle to
be stated in gross in the Treaty. Thus 600, Nisqually at
$5 per head = $3.000 for the first year = $2.700 and so many
years. to be expended as Head Chiefs in the Presidents
shall direct.

Art. V. To build Shops near the Agency or other Reserves
to build houses for the Chiefs, as also to Mill, Smithy &c.
&c. in Some Reserve. The United States further agrees to keep a
Farmer agreed to the first years annuity

Art. VI. Should anything be divided the land and proje
ceed to heads of families.

The United States to maintain at the Central Agency
an agricultural School for the Tribes in Common
with the Tribes, Yakama Nisqually Flatheads &c.

Art. VII. The annuities not to be taken to pay debts of individuals.

Art. VIII. The Indians agree to be on friendly terms with the white. Reparations to be made out of annuity for any depredations committed on the United States citizens by Indians. Indians committing offenses against whites to be tried by the laws of the U. S. and if convicted punished. Injuries by Indians to whites to be in like manner punished according to law.

Each tribe to be responsible for offenses committed by its people. Any others who may be found among them to be looked to and required to depart from the Country at once. To be returned to the limits of their lawful authority by the Government.

Art. IX. No white man shall be allowed to reside on any Reservation, and Indians may at any time be compelled by superintending to stay there.

Art. X. Agrees to be bound to pay Reserve. If any Indian or white man any time and destroy it. Indians to forfeit the share of the Annuities.

Art. XII. Tribe may punish offenders of the one tribe for any offense committed according to the usages & customs of the Chief Council for the trial of the offenders.

Art. XIII. They agree to pay all claims held at the time of the treaty, and to make no more.

Art. XIV. System of Apprenticeship established.

Art. XV. They agree not to trade at Penn Island. No whites shall forge Indian permit to reside on their lands.

4

In regard to the division of Tribes into Districts, and selecting their respective Reserves, the following rules to be considered as the utmost limits to be allowed.

Probable Reserve.

		Square Miles
1.	From Pugallup to Stanley Prairie by the Villages Squawkum, Nisqually, Pugallup. Perhaps all may be removed to Squawkum	611
2.	Dwamish, Suquamish &c One Village on East side of Hoods Canal.	1581
3.	Snoqualmoo and Snohomish One at mouth of Snohomish River	
4.	Skagit, Nikaillis &c One at mouth of Skagit River One at mouth of	
5.	Lummy, Nookshak &c One, on Samish One on Lummi	557
6.	Skallams, Chimakum & Skotomish One on Hoods Canal One on the Straits	982
7.	Macaws &c on Coast Two Villages	585
8.	Quillehute & Ozette Chiefs Two Villages	
9.	Chinooks & Lower Chiefs One on North side Bay Nasten	
10.	Dwamish Chief One on the River	

It is known perhaps, if practicable, to remove all the Indians on the East side of the Sound as far as the Snohomish, as also the Skallams to Hoods Canal, and generally to adopt as far Removing as possible, with the view of finally concentrating them in one.

RECORDS OF THE PROCEEDINGS OF THE COMMISSION TO HOLD TREATIES WITH THE INDIAN TRIBES IN WASHINGTON TERRITORY AND IN THE BLACKFOOT COUNTRY.

1854—Olympia, W.T. December 7th. Governor Isaac I. Stevens organized the Commission by appointing James Doty, Secretary, George Gibbs, Surveyor, H. A. Goldsborough, Commissary, and Frank Shaw, interpreter.

Col. M. T. Simmons, Special Agent for the Puget Sound District, was present.

The Commissioner read a letter addressed by him to the Secretary of the Interior concerning charges preferred against M. T. Simmons, Special Agent and containing extracts from a letter from Secretary C. H. Mason to the Commissioner upon the same subject in both of which letters the said charges were emphatically denied and refuted. The letter was ordered on file.

The Comissioner spoke of general operations among the Indian Tribes in Washington Territory and the necessity of speedily concluding Treaties with them and placing them on Reservations.

The Secretary then read Treaties lately concluded by the Commissioner of Indian Affairs with the Ottoe and Missouria Indians and the Omahas, and their provisions were fully discussed, and the proper form for Treaties with Tribes west of the Cascade Mountains was considered.

After considerable discussion upon Reservations, Fishing Stations, Farms, Schools etc. the Commissioner directed Mr. George Gibbs to prepare a programme of a Treaty in accordance with the views of the Commission.

The question of employing a small schooner for the use of the Commission and transportation of Indian Goods came up, and it was decided to employ such schooner at $700 per month manned and victualled by the owner.

The Commission then adjourned to December 10th.

Dec. 10th.—The Commission met and duly organized—Mr. Gibbs presented the outline Draft of a Treaty, which after

discussion and light modification was adopted as the basis of the Treaties to be held with the Tribes upon the Sound and the Pacific Coast, and is as follows:

"It is proposed that all the Indians to be first treated with, be seen and summoned to meet at the mouth of the Nisqually on the 24th inst. In the meantime the general purport of the assembly to be explained: The details to be settled there. The reserve to be agreed on and set apart. Gov. Stevens to be then notified that he may attend and conclude the Treaty—He to read them an address and a feast then to be given.

"The first party to be composed of Indians from Ininity Prairie to the Puyallup—next, probably Hood's Canal, as Reserves will be located there—then the Duamish and so on down the Sound to Bellingham Bay and the Straits—subsequently by land the lower coast, Cowlitz and Columbia Rivers."

Heads of Proposed Treaties

Art. I. The following named Tribes and Bands cede to the United States all their lands whatsoever.

Art. II. There is however reserved to the use of said Tribes the following tracts, viz:

The rights of fishing at common and accustomed places is further secured to them: Proviso against staked or fenced claims.

May be removed from one Reservation to another on payment for improvements and cost of removal.

Art. III. The Tribes agree to remove to and settle on the aforesaid Reserves within one year after ratification of the Treaty, or sooner if means are furnished them.

Art. IV. In consideration of the cession the United States agree to pay the said Tribes etc. the sum of $..... (rate $10.00 for chiefs—$7.50 for sub chiefs—$5 for Tillicum, to be paid in annual installments decreasing at the rate of 5 per cent per annum. *Note*-The sum calculated on this principle to be stated in gross in the Treaty. Thus 650

Nisquallys at $5 per head is $3,250 for the first year or $32,500 in twenty years, to be expended in such manner as the President shall direct.

Art. V. To enable them to move and settle on their Reserves to build houses for their chiefs, as also to indemnify settlers, if any, on lands reserved. The United States further agree to pay a bonus equal to the first years annuity.

Art. VI. President authorized to divide their land and assign lots to heads of families.

The United States to maintain at the Central Agency an Agricultural School free to their children in common with other Tribes and provide Medical Attendance.

Art. VII. The annuities not to be taken to pay debts of individuals.

Art. VIII. The Indians agree to be on friendly terms with the whites. Depredations to be made good out of annuity money. The United States also to indemnify Indians for horses stolen by the whites.

Not to make war on any other tribes but submit differences to agent. Depredations by one tribe against another to be paid out of annuities. Citizens of the United States may safely pass through their reserve. Roads may be run through them on compensation being made. Injuries committed by whites towards them not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished. Injuries by Indians to whites to be in like manner prosecuted and punished according to law.

Every tribe to be responsible for offenses committed by its people or by others in their lands. Chiefs in the first instance to be looked to and required to deliver up criminals at once—To be in return supported in the exercise of their lawful authority, by the Government.

Art. IX. No white man shall be allowed to reside on any Reservations and Indians may at any time be compelled by Superintendent to stay there.

Art. X. Liquor to be excluded from Reserves—If brought, any Indian or white man may seize and destroy it. A drunken Indian to forfeit his share of the annuities.

Art. XII. Tribes may punish offenders of their own Tribe for any offense committed, according to their own laws, a majority of the Chief's forming a court for the trial of all offenders.

Art. XIII. They agree to free all slaves held at the time of the treaty, and to make no more.

Art. XIV. System of Apprenticeship introduced.

Art. XV. They agree not to trade at Vancouver Island, nor shall foreign Indians be permitted to reside on their lands.

"In regard to the Division of Tribes into Districts, and settling them upon Reserves, the following were to be considered as the utmost limits to be allowed."

PROBABLE RESERVES

	Souls
1. From Puyallup to Ininity Prairie	638
Say three villages, Squawskin, Nisqually, Puyallup. Perhaps all may be removed to Squawskin.	
2. D'Wamish, Suquamish etc.	454
One village on East side of Hoods Canal	
3. Snoquahoo and Snohomish	
One at mouth of Snohomish River	
4. Skagit, Kikiallis etc.	
One near mouth of Skagit River	
One near mouth of	
5. Lummi, Nooksakt etc.	
One on Samish	551
One on Lummi	
6. Sklallams, Chemacums and Skokomish	982
One on Hood's Canal	
One on the Straits	

7. Makahs etc. on Coast 585
   Two Villages.

8. Cowlitz and Upper Chehalis
   Two Villages.

9. Chinooks and Lower Chehalis
   One on north side of Grays Harbor.

10. Quini-utt.
    One on the River.

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October Term, 1976
1976 No. 76-5729

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BRIEF FOR THE STATE OF SOUTH DAKOTA, ET AL., AS AMICI CURIAE

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BRIEF FOR THE STATE OF SOUTH DAKOTA, ET AL., AS AMICI CURIAE

I.

INTEREST OF AMICI CURIAE

In *Oliphant* v. *Schlie, et al.*, 544 F.2d 1007 (9th Cir. 1976), a Federal Circuit Court of Appeals for the first time has approved the exercise of criminal jurisdiction by an Indian tribe over a non-Indian. This decision, breaking new ground in the area of tribal criminal jurisdiction, has profound implications.

The Attorney General of the State of South Dakota states that the decision in *Oliphant*, together with *Belgarde* v. *Suquamish Indian Tribe* (9th Cir., No. 75-3319, not yet decided), has a definite impact upon the State of South Dakota and its citizens. There are nine Indian tribes located within the State of South Dakota.[1] Further, there are eight reservations or former reservations located within the boundaries of the State of South Dakota.[2] Further, the area of Indian country within the State of South Dakota consists of over five million acres, including trust land, and comprises all or significant portions of 15 of the 67 counties in South Dakota. Within the reservation boundaries themselves, a significant percentage of the resident population is non-Indian. In addition, many South Dakota citizens and out-of-state tourists travel through reservation areas on state and federal highways.

Further, since the decision of the District Court in this case, five tribes within the State of South Dakota have passed tribal ordinances which assert criminal and civil jurisdiction over non-Indians within the confines of their reservations.[3] Additionally, on numerous occasions, these Indian tribes located within the State of South Dakota have attempted, over the objections of the State of South Dakota, to enforce these ordinances against non-Indian citizens.[4]

There is no question but that relationships between Indian and non-Indian citizens within the confines of an Indian reservation are extremely complex and naturally subject to

1. The Flandreau, Rosebud, Oglala, Crow Creek, Lower Brule, Yankton, Sisseton-Wahpeton, Standing Rock and Cheyenne River Sioux Tribes.

2. The Sisseton-Wahpeton, Yankton, Lower Brule, Crow Creek, Rosebud, Pine Ridge, Standing Rock and Cheyenne River Reservations.

3. The Oglala, Rosebud, Sisseton-Wahpeton, Crow Creek and Cheyenne River Sioux Tribes.

4. A total of 95 such attempts have been reported to the South Dakota Attorney General's office.

some change. However, citizens of all races have been hampered in their efforts toward the development of constructive and cooperative relations between tribal governments, municipalities, political subdivisions and state governments by the fast pace of changes in federal Indian policy, as well as changing interpretations of existing statutes by the judiciary. *Oliphant* is a typical case in point. This Court is now called upon to resolve the question of whether an Indian tribe may exercise criminal jurisdiction over a non-Indian. This "question" has lain dormant for over one hundred years, and the understanding during that time period of virtually all courts, tribes and states was that summarized by Felix Cohen:

> On the other hand, attempts of tribes to exercise jurisdiction over non-Indians, although permitted in certain early treaties, have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody. F. Cohen, *Handbook of Federal Indian Law* (University of New Mexico, Reprint, 1971), p. 148.

The decision of the Ninth Circuit Court of Appeals now changes that common understanding.

Non-Indian citizens, who decades ago decided to reside or remain within the confines of an Indian reservation, may now suddenly find themselves subject to tribal jurisdiction. This event could not have been reasonably foreseen by those non-Indian citizens and would create undue hardships for them as they would be subject to the jurisdiction of a governmental entity in which they are virtually excluded from participation.

It is not fair to analogize the position of these non-Indian, permanent residents on an Indian reservation to that of transients traveling through the jurisdiction of another govern-

mental entity. First, the permanency of their residency gives them a continuing interest in the laws and ordinances which govern them. Second, it must be remembered that these individuals have never left the confines of their original sovereign entity, the State of South Dakota. Thus, they are not in a position similar to that of international travelers who have left the boundaries of their original governmental entity.

The Court in the instant case is called upon to decide an especially significant question in the field of Indian law within the confines of a specific factual situation. However, the question before the Court is truly an abstract one. Whether state and local law enforcement officials have properly exercised their undisputed jurisdictional prerogatives over criminal conduct by non-Indians within the confines of an Indian reservation in the particular circumstances set forth in this case is of no relevance. There are appropriate equitable and legal remedies against public officials who fail to carry out properly their duties or responsibilities. The question must be determined with reference to the broader principles involved.

It is important to realize that the decision of the Ninth Circuit in this case disturbs an almost one-hundred-year status quo during which time it was understood that non-Indians were not subject to the criminal jurisdiction of Indian tribes. The decision in this case will not result in the impairment of the ability of any Indian tribe to govern itself. Intratribal relations will not be affected adversely by a reversal of the Ninth Circuit's decision. The decision in this case will have no impact upon the long standing and appropriate limits of a state government's jurisdiction over tribal members within the confines of a reservation. Tribal self-government has developed steadily since 1934, without the imposition of criminal jurisdiction over non-Indians. Indeed, the development of tribal government without criminal jurisdiction over non-Indians is basically akin to the development of municipalities and state

political subdivisions within the boundaries of Indian reservations without jurisdiction over tribal members. In both cases, the respective governmental authorities have recognized the limits of their jurisdiction and have worked within the limits of that jurisdiction since tribal self-government became the central focus of federal Indian policy with the passage of the Indian Reorganization Act of 1934. In short, a reversal of the Ninth Circuit's decision would merely maintain the status quo and leave Indian tribes in the historical jurisdiction position which they have occupied for over a century.

SUMMARY OF ARGUMENT

The court below has held that Indian tribes may exercise criminal jurisdiction over non-Indians. Amici contend that this holding by the court below is erroneous.

The doctrine of inherent tribal sovereignty is relied upon by the court below as the source for this criminal jurisdiction over non-Indians. Not only is the doctrine of inherent tribal sovereignty a particularly elusive concept with no clear boundaries, but also a very limited concept designed for use in resolving questions of federal preemption rather than providing a broad and ill-defined range of governmental powers for Indian tribes.

Further, the treaty involved in the instant case is primarily silent on the question of criminal jurisdiction over non-Indians. Nevertheless, when viewed in the context of the history of federal and Indian treaty-making, it is clear that this silence does not bespeak a grant of criminal jurisdiction over non-Indians to the Indian tribe involved but rather bespeaks a denial of that jurisdiction. When such jurisdiction was intended by the United States to be granted to Indian tribes, it gave specific grants. Later, as the attitudes of the federal government toward the granting of this jurisdiction to Indian tribes changed, the grant of jurisdiction was either expressly denied or the denial implied through silence.

Neither the concept of inherent tribal sovereignty, nor the particular treaty involved, will grant the Suquamish Tribe criminal jurisdiction over non-Indians. In addition, the federal statutory scheme regulating criminal conduct in Indian country makes clear that Indian tribes do not have such jurisdiction over non-Indians. The express language of 18 U.S.C. 1152 and 1153 sets forth the general outlines for the exercise of criminal jurisdiction in Indian country. These statutes must be construed as creating serious anomalies and contradictions unless it is presumed that Indian tribes cannot exercise criminal jurisdiction over non-Indians. The legislative history behind 18 U.S.C. 1165, and the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, also reenforce this central precept of federal Indian policy that Indian tribes cannot exercise criminal jurisdiction over non-Indians.

The Bureau of Indian Affairs and the United States Department of Interior have, until the very recent past, held that Indian tribes do not possess criminal jurisdiction over non-Indians. This position of the Bureau of Indian Affairs and the Department of Interior was expressed in both a Solicitor's Opinion and in the Model Code of Indian Offenses. Further, in the Department's revision of Felix Cohen's work on federal Indian law, the same conclusion is reached. The shift in the B.I.A.'s attitude toward this question since 1970 is not well-founded, and the historic position of the B.I.A. and the Department of Interior is more persuasive.

The policy questions involved in this case also militate against a holding that Indian tribes can exercise jurisdiction over non-Indians. Regulation of non-Indian criminal conduct is not an essential attribute of tribal self-regulation. Federal Indian policy clearly requires noninterference by states in the conduct of internal tribal affairs. However, regulation of non-Indian criminal conduct is clearly not the type of internal affair which federal Indian policy contemplates as essential. The problems of

law enforcement within Indian country are extremely complex, and state political subdivisions operating within the confines of Indian country are subject to virtually symmetrical restrictions to those the Tribe now seeks to eliminate in the dealing by such state political subdivisions with Indian offenders. Amici submit that these symmetrical restraints are appropriate and that the removal of one set of restraints would not provide effective law enforcement. Rather, Amici submit that effective law enforcement within the confines of Indian country can be obtained only through the cooperation of federal, state, and tribal governments and state political subdivisions. This cooperation has been tried at various locations throughout the United States and does represent a viable policy.

II

ARGUMENT

A. THAT THE QUESTION OF WHETHER AN INDIAN TRIBE MAY EXERCISE CRIMINAL JURISDICTION OVER A NON-INDIAN IS ONE OF FEDERAL PREEMPTION RATHER THAN INHERENT TRIBAL SOVEREIGNTY.

The court below relies throughout its discussion of the case upon the concept of original tribal sovereignty. Amici believe that Judge Kennedy in his dissenting opinion is correct in pointing out that the issue is "in fact, one of federal preemption of the regulation in the field of Indian affairs." As Mr. Justice Marshall stated in *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973):

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. . . . The modern cases thus tend to avoid re-

liance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. *Id.* at 171.

Justice Marshall goes on to explain the utility of the Indian sovereignty concept and the limitations of that concept.

> The Indian Sovereignty Doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. *Id.* at 172.

The concept of tribal sovereignty was first utilized by Mr. Chief Justice Marshall almost one hundred and fifty years ago in *Worcester* v. *Georgia*, 31 U.S. 515 (1832). Since that original articulation, the concept of Indian sovereignty has undergone, in the words of Mr. Justice Marshall, "considerable evolution," *McClanahan, supra,* at 171. Nevertheless, this Court has always recognized that the Indian tribes were not "possessed of the full attributes of sovereignty," and that only the States and the federal government were full sovereigns:

> But these Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. *United States v. Kagama*, 118 U.S. 375 at 379 (1886).

In *Williams* v. *Lee*, 358 U.S. 217 (1959), this Court further explained the context in which the concept of tribal sovereignty is valid:

> Over the years, this Court has modified [the tribal sovereignty concept] in cases where essential tribal

> relations were not involved and where the rights of Indians would not be jeopardized. . . . Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Id.* at 219-220.

Thus, the Court has consistently used the doctrine of limited tribal sovereignty in connection with the regulation by a tribe of intratribal relations among its members. In fact, the primary restriction on the tribal sovereignty concept has been its limitation to intratribal affairs. The federal courts have been extremely protective of the tribes' authority to regulate the conduct of their own members subject only to occasional intrusions by federal statute. The boundaries and limitations of a state government's ability to interfere in such relationships have been clearly marked and severely limited. On the other hand, the concept of tribal sovereignty has never been approved for use outside the context of intratribal relations and should not be so used at this time.

Rather, the concept of limited tribal sovereignty should be used only as a backdrop against which to interpret federal statutes and treaties. These statutes make clear that Congress has never statutorily granted Indian tribes jurisdiction over non-Indians, and further, only rarely have treaties granted the exercise of criminal jurisdiction by Indian tribes over non-Indians. The question of this case is one of preemption, not original sovereignty.[5]

A further reason for not deciding this case on the grounds of inherent tribal sovereignty is the elusive nature of the boundaries of that concept. It is difficult to see where limits on

5. For a full discussion see Martone, "American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License," 51 *Notre Dame Lawyer* 600 (1976).

the inherent tribal sovereignty doctrine could be placed once the doctrine is approved for use outside of the federal preemption context. Indeed, as noted in *McClanahan*, it has largely been rejected even where the question is the limitation of state regulation, rather than the exercise of governmental powers by a tribe. Amici strongly believe this case should also be resolved with reference to the treaties and statutes and policies involved rather than upon the ill-defined concept of tribal sovereignty.

B. THAT THE SILENCE OF THE TREATY OF POINT ELLIOTT DOES NOT JUSTIFY THE SUPPOSITION THAT CONGRESS INTENDED TO PERMIT INDIAN TRIBES TO EXERCISE CRIMINAL JURISDICTION OVER NON-INDIANS.

Both the majority opinion below and the Tribe make much of the fact that the Treaty of Point Elliott, 12 Stat. 927 (1859), does not have any specific reference to the question of tribal jurisdiction over non-Indians. Their argument is rooted in their unsupported assertion that such jurisdiction existed in the Tribe as an attribute of the Tribe's "sovereignty" and continued unabated in the absence of an express provision prohibiting tribal jurisdiction over non-Indians. While it is true that some later Indian treaties made explicit the inability of Indian tribes to exercise such criminal jurisdiction and to punish non-Indians, the silence in the Treaty of Point Elliott certainly does not support a contrary inference. In order to fully comprehend the import of various provisions in the Treaty of Point Elliott, it is necessary to adopt a historical perspective concerning Indian treaties.

Felix Cohen has given this summary sketch of the development of Indian treaties over the course of time:

> Some of the earliest treaties adopt the rule usual in treaties between equals. Whites committing offenses

> within the Indian country against Indian laws are subjected to punishment by the Indian tribe, just as Indians committing offenses against state or federal laws outside the Indian country are subjected to punishment by state or federal courts.
>
> A number of treaties adopt a modified rule, similar to that found in treaties between the United States and various Oriental nations, whereby the United States is granted jurisdiction over its citizens in the Indian country, to punish them for offenses they may commit, and the Indian tribe undertakes to deliver such offenders to the agents of the Federal Government. F. Cohen, *supra*, at 45.

In the 1958 revision of Felix Cohen's treatise by the United States Department of the Interior, a summary of federal treaty-making history is given as follows:

> Generally speaking, offenses by non-Indians against Indians are punishable in federal courts where the offense is one specified in the Federal Code of Territorial Offenses. This is not always the rule. Early treaties frequently provided that non-Indians committing offenses in Indian country against Indians should be subject to punishment by tribal authorities. This rule, which followed the practice in international treaties, was abandoned after a few years of treaty-making, and many of the later treaties expressly provided that white offenders should be delivered up to the federal authorities for prosecution. United States Department of Interior, *Federal Indian Law*, at 323 (1958).

The Treaty of July 2, 1791, with the Cherokee Indians, 7 Stat. 39, states in Section 8:

> If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokee's lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please.

As the dissenting opinion below points out, it is difficult to explain the importance of this provision if the tribe already had such authority as an attribute of "inherent sovereignty." Similarly, why does the treaty provision distinguish between non-Indians who are merely passing through Cherokee lands and those who have settled upon such lands? It would seem that the "inherent sovereignty" approach would justify the exercise of criminal jurisdiction against either of those two categories. Therefore, the exact text of the Cherokee Treaty indicates that power to punish non-Indian offenders was not inherent with Indian tribes as viewed by the federal government as early as 1791, and that at no point did the federal government ever relinquish criminal jurisdiction over non-Indian transients passing through Indian country to the Cherokees.

The language of the Treaty of Point Elliott, makes no such specific grant of jurisdiction over non-Indian settlers to the Suquamish Tribe. In Article IX of such treaty, the Suquamish "acknowledged their dependence on the Government of the United States. . . ." Further, in the event of Indian offenses against both Indians and non-Indians, the Tribe agreed "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial."

The acknowledgement of dependence upon the United States certainly is a central provision in the treaty. It is a provision which demonstrates the inapplicability of the Tribe's

sovereignty concept to the question of jurisdiction over non-Indians. Rather, as has been previously noted, the concept of tribal sovereignty should be limited to its proper role in discussing questions dealing with federal preemption. The procedures set forth in Article IX of the Treaty of Point Elliott for the delivery of Indian offenders against the laws of the United States to the federal authorities certainly militates against an interpretation that offenders who are not Indians could be dealt with under the tribal system of justice rather than delivering them to the federal authorities for trial. Therefore, the silence of the Treaty of Point Elliott on the question of Indian jurisdiction over non-Indians can be interpreted only as confirming the absence of such jurisdiction.

The opinion of the United States Attorney General in discussing an Indian treaty with the Choctaw Tribe is persuasive. In discussing the Choctaw Treaty, the Attorney General stated:

> The Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own laws, 'any white man' who shall come into the nation, and infringe any of their national regulations, (Article 4). But Congress did not accede to this request. On the contrary, it made provision, by a series of laws, for the punishment of crimes affecting white men, committed by or on them in Indian country, including that of the Choctaws, by the courts of the United States. (See Act of June 30, 1834, iv Stat. at large, p. 729, and Act of June 17, 1844, v Stat. at large, p. 680.) These Acts cover, so far as they go, all crimes except those committed by Indian against Indian. 7 *Op. Atty. Gen.*, 174, 179 (1855).

This contemporaneous opinion by the United States Attorney General should be accorded high weight in construing the

understanding of the federal government as to tribal jurisdiction over Indians and non-Indians at the time the Treaty of Point Elliott was made.

As was noted by Felix Cohen, the patterns of federal Indian treaties varied considerably over time. However, with few exceptions such as the Cherokee Treaty previously cited, wherein the federal government granted express authority to the Cherokee Tribe to exercise jurisdiction over certain (but not all) non-Indians, the treaties have uniformly prohibited this exercise of jurisdiction over non-Indians by Indian tribes. This denial has sometimes been basically by silence, such as the Treaty of Point Elliott and that of the Choctaws. Sometimes this was done by implication through language relative to the punishment of persons committing offenses against the tribe. In this regard, Article V of the treaty between the United States and the Hunkpapas Band of the Sioux Tribe, ratified July 16, 1825, 7 Stat. 257, is typical:

> [I]t shall be the duty of said Chiefs, upon complaint being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States. And in like manner, if any robbery, violence or murder, shall be committed on any Indian or Indians belonging to the said band, the person or persons so offending shall be tried, and if found guilty, shall be punished in like manner as if the injury had been done to a white man. . . . And the said Hunkpapas Band engage, on the requisition or demand of the President of the United States, or of the agents, to deliver any white man resident among them.[6]

6. For similar language, see Article V of the treaty between the United States and the Sioune and Ogallala Tribes, ratified July 5, 1825, 7 Stat. 252; Treaty with the Teton, Yancton, Yanctonies Bands of the Sioux Tribe of Indians, ratified June 22, 1825, 7 Stat. 250.

Nevertheless, the language in this particular treaty leaves no doubt that the federal government will be the punishing agency for any offenses committed by non-Indians against Indians, even though the language is not as clear as would be evidenced in later treaties.

In the Second Treaty of Fort Laramie, 15 Stat. 635 (1868), the language relative to tribal jurisdiction over non-Indians reached what is perhaps its all-time high in clarity. The second paragraph of Article I states:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

This language is particularly interesting in two areas. First, the references to bad men among the whites committing "any wrong" upon a person or property of Indians suggests exclusive federal jurisdiction. Second, the offender is to be delivered to the United States for punishment "according to the laws of the United States." It is difficult to see how this language could be construed as leaving any jurisdiction over non-Indians to the Indian tribe whatsoever or how it is consistent with the concept of inherent tribal sovereignty.

Amici have dwelt at some length upon the wide variance of treaty language in the course of almost one hundred fifty years of treaty-making with various Indian tribes. That language runs the entire gamut on the question of tribal jurisdiction over non-Indians. First, in extremely early treaties such as the Cherokee Treaty, the tribe was explicitly granted jurisdiction

over certain non-Indians. Second, there was a phase in which, such as the Hunkpapa Treaty, non-Indians were to be delivered to a federal Indian agent upon his demand and a further assurance to the tribe that offenders against Indians and Indian property would be dealt with by the federal government "as if the crime were committed against a white person." Then, there was the time period, such as the Treaty of Point Elliott, wherein the tribe acknowledged its dependence to the United States Government and the balance of the treaty was generally silent as to the question of jurisdiction. In this case, one must rely upon the collateral evidence such as the United States Attorney General's Opinion describing the Choctaw Treaty made at roughly the same time. Finally, there is the example of the Second Treaty of Fort Laramie wherein, the exclusion of criminal jurisdiction over non-Indians from Indian tribes is made explicit.

Amici submit that this varying history and language is most easily explained, not in a notion of tribal sovereignty which includes a concept of criminal jurisdiction over non-Indians unless explicitly denied, but rather in the notion of dependence upon the federal government by which the tribe had no criminal jurisdiction over non-Indians except when such jurisdiction was explicitly granted to them. Not only does this interpretation harmonize with the language of the Cherokee Treaty, the 1855 Attorney General's Opinion and the whole development of Indian treaties, but also with the case law as developed in the federal courts during this same period of time.

C. THAT VARIOUS FEDERAL STATUTES RELATIVE TO CRIMINAL JURISDICTION WITHIN INDIAN COUNTRY MAKE CLEAR THAT INDIAN TRIBES DO NOT HAVE JURISDICTION OVER CRIMINAL OFFENSES BY NON-INDIANS.

Respondents' position in the lower courts was that the

federal scheme for the regulation of criminal conduct within the boundaries of Indian country provides for concurrent jurisdiction by an Indian tribe over criminal offenses committed by non-Indians. The Respondents go on to argue that such concurrent jurisdiction results from a tribe's inherent sovereignty and that such concurrent jurisdiction could be withdrawn from a tribe only through explicit federal legislation. As shown immediately above, the Tribe's reliance upon inherent tribal sovereignty is misplaced. Both treaty interpretation and the concept of federal preemption preclude the Tribe from relying upon the doctrine of tribal sovereignty.

Nevertheless, Amici contend that even granting *arguendo* that the Tribe's inherent sovereignty argument is correct, the federal statutory scheme covering criminal conduct in the Indian country makes clear that the Tribe does not have concurrent jurisdiction over non-Indian offenses.

The first statute of interest in this regard is 18 U.S.C. § 1152:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

This particular section was enacted originally as Section 4 of the Indian Trade and Intercourse Act of 1802, 2 Stat. 141, and reenacted in 1817, 3 Stat. 383, and as Section 25 of the Indian Trade and Intercourse Act of 1834, 4 Stat. 733, and modified again in 1854, 10 Stat. 270. Although this statute has had a considerable legislative history, two items bear particular importance. First, Congress has not seen fit to revise this statute since 1854. Second, its central concepts have not been changed during its history. Beginning with the earliest Trade and Intercourse Acts, Congress provided for federal jurisdiction over all non-Indian crimes involving Indians. Trade and Intercourse Acts of 1790, 1 Stat. 137; of 1793, 1 Stat. 329; and of 1796, 1 Stat. 469.

The 1854 enactment was aimed at eliminating the possibility of double jeopardy through the trial of an Indian offender by both an Indian tribe and the federal government. Accordingly, the language now found in the second paragraph of 18 U.S.C. § 1152 was added at that time. The interesting fact about this 1854 addition to 18 U.S.C. § 1152 is that it extends the double jeopardy protection to Indians alone. A non-Indian if charged by a tribe for a criminal offense (as Respondents claim is possible) cannot look to the second paragraph of 18 U.S.C. § 1152 for double jeopardy protection against a later federal charge for the same offense. Under the Tribe's position, and as adopted by the majority opinion below, the fact that this double jeopardy protection extends only to Indians is treated as an oversight in view of the preoccupation of the Congress with the Kansas-Nebraska debates. Amici must agree with the dissenting opinion below that, contrary to indicating an "oversight," the 100-year failure of Congress to correct this alleged "oversight," bespeaks a Congressional intent that the statute as it now stands properly expresses its intent. Surely that intent was to eliminate double jeopardy for all criminal offenders in Indian country. This intent is fully effectuated by the precise language of the second paragraph of 18 U.S.C.

§ 1152. The efficacy and precision of that language necessarily requires that Indian tribes do not have criminal jurisdiction over non-Indians.

The so-called Major Crimes Act, 18 U.S.C. § 1153, provides an even more striking example of Congress' understanding that Indian tribes did not have criminal jurisdiction over non-Indians. This is particularly true when the Major Crimes Act is viewed in the context of the double jeopardy argument just raised. Passed originally in 1885, 18 U.S.C. § 1153 provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

This statute, passed three-quarters of a century before the Indian Civil Rights Act, has the effect of granting the federal government exclusive jurisdiction over major crimes committed by Indians within Indian country and leaves the tribe itself with no major crime jurisdiction in this area whatever. The Respondents would have this Court believe that, notwithstanding the inability of a tribe to exercise criminal jurisdiction over major crimes committed by its own members, it could exercise major crime jurisdiction over nonmembers. It is surely not credible that Congress so intended to circumscribe a tribe's criminal jurisdictional authority with respect to members but not to nonmembers. Rather, the clear import of the Major Crimes Act is that Indian tribes do not have concurrent criminal jurisdiction over non-Indian offenses committed within Indian country.

Preoccupation with the Kansas-Nebraska Act cannot explain passage of the Major Crimes Act in 1885. On the contrary,

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Congress fully understood precisely what it was doing in passing both 18 U.S.C. § 1152 and § 1153. Both sections are premised upon the clear Congressional understanding that Indian tribes may not exercise criminal jurisdiction over non-Indians.

In the court below, Repondents attempted to utilize a piece of proposed legislation defeated in 1834 as the basis for their argument that the predecessor statute of 18 U.S.C. § 1152 contemplated tribal jurisdiction over non-Indians. This attempt by Respondents is entirely misplaced. The House Committee on Indian Affairs did report out three bills which it viewed to be a connected package. The subjects of these three bills included the reorganization of the Department of Indian Affairs, a reenactment of the Indian Trade and Intercourse Act and a bill creating a Western Indian Territory. House Report No. 474, 23rd Cong., 1st Sess., June 20, 1834. The Tribe, in its brief below, points to Section 9 of the Western Territory bill as showing that the criminal jurisdiction authority of the tribes within the proposed Western Indian Territory would extend to non-Indians. Respondents then attempt to bootstrap their position by contending that if the committee desired concurrent jurisdiction under the Western Indian Territory bill, that it must have also intended concurrent jurisdiction under the Indian Trade and Intercourse Act.

The weakness in Respondents' position is that the Indian Trade and Intercourse Act were not restricted simply to the territory encompassed within the Western territory bill. Furthermore, the bills to reorganize the Indian Affairs Department and to recodify the Indian Trade and Intercourse Act passed with little opposition. However, the Western Territory bill aroused sufficient opposition to result in its being tabled in the 1834 Session and never successfully passed. Additionally, resort to the clear language of Section 25 of the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, the predecessor to 18 U.S.C. § 1152, provides no basis for Respondents' contention

that it implies concurrent jurisdiction:

> Section 25. *AND BE IT FURTHER ENACTED*, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be enforced in the Indian Country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Additionally, the contemporaneous interpretation of the United States Attorney General of this statute is also of particular relevance:

> [T]he 25th Section of the Act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person or property of another: thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves. 2 Op. Attorney General 693 at 695 (1834).

Surely, this interpretation by the United States Attorney General of Section 25 of the Indian Trade and Intercourse Act ought to be accorded more weight than the interpretation suggested by Respondents relying upon the relationship between the Indian Trade and Intercourse Act of 1834 and a defeated bill – a bill which was defeated in part because of strong Congressional opposition to the concept of tribal

criminal jurisdiction over non-Indians.

Respondents, in the court below, also point to an amendment made to the Major Crimes Act as additional support for its contention that the Tribe has concurrent jurisdiction. Respondents cite the amendment offered by Congressman Budd to strike the words "and not otherwise" from the original Major Crimes Act bill. Congressman Budd, in explanation of this proposed amendment, which was successful, stated that:

> The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country.... I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases. Cong. Rec., Vol. 16, Pt. II, at 934 (1885).

Respondents, however, miss the point of Congressman Budd's amendment. Congressman Budd sought to give tribes concurrent jurisdiction over Indian offenders only. His amendment did not affect the tribal lack of jurisdiction in criminal cases over non-Indians. Also, despite the success of Congressman Budd's amendment, the courts, in construing the Major Crimes Act, have held that the jurisdiction granted therein is exclusive.[7]

This same federal policy is evident in 18 U.S.C. § 1165. That section makes hunting, trapping or fishing on Indian land without proper authority a federal crime. This section was passed in 1960, and the Senate Committee Report issued in connection with this particular bill makes clear the continuing Congressional understanding that Indian tribes did not have criminal jurisdiction over non-Indians. In part, the Committee Report states:

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7. See *DeMarrias* v. *State of South Dakota*, 319 F.2d 845 (8th Cir. 1963); *State* v. *Youngbear*, 229 N.W.2d 728 (Iowa, 1975), cert. den. 423 U.S. 1018.

> Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law, but a non-Indian trespasser on an Indian Reservation enjoys immunity. This is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.... Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. S.Rep. No. 1686, 86th Cong., 2d Sess. at 2-3 (1960).

Finally, the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, also follows in this same Congressional pattern. The major section of that Act, 25 U.S.C. § 1302, makes reference to the denial of certain constitutional rights to "any person" by an Indian court. The Tribe emphasizes the fact that during the course of the legislative history of the Indian Civil Rights Act, the bill was amended to insert that phrase throughout the bill instead of the phrase "American Indian." However, this change does not necessitate the Tribe's conclusion that Congress contemplated Indian tribes exercising criminal jurisdiction over non-Indians. Indeed, the reasoning behind this change, related to the protection of noncriminal rights of non-Indians, is explained at some length in *Dodge* v. *Nakai*, 298 F. Supp. 219 at 24-25 (1968). Also, the *Dodge* case is a prime example of where a non-Indian's rights were protected by the Indian Civil Rights Act even though the question of criminal jurisdiction did not arise. Furthermore, it was the understanding of Congress that the criminal applicability of the bill would be limited to tribal members.[8]

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8. See the discussion in the dissenting opinion below, *Oliphant*, *supra*, at 1016-1017.

Thus, even if the position of the Tribe that its inherent sovereignty included criminal jurisdiction over non-Indians is accepted, one can see that the federal statutory scheme in the area of criminal jurisdiction within the confines of Indian country does, in fact, exclude the exercise of criminal jurisdiction by Indian tribes over non-Indians. This is made abundantly clear in 18 U.S.C. §§ 1152 and 1153. Also, statutes of less central importance, such as 18 U.S.C. 1165 and the Indian Civil Rights Act, make clear that Congress did not intend or contemplate that Indian tribes could exercise criminal jurisdiction over non-Indians.

Throughout all of these statutory enactments, from the first Indian Trade and Intercourse Act to the present day, there is a consistent understanding in federal Indian policy. That understanding is that Indian tribes do not have any criminal jurisdiction over non-Indians, with the sole exception of those instances in which an Indian treaty gives a tribe specific and unambiguous authority to exercise that jurisdiction.

D. THAT THE FEDERAL AGENCIES INVOLVED IN THE ADMINISTRATION OF FEDERAL INDIAN PROGRAMS HAVE TRADITIONALLY RECOGNIZED THE FACT THAT INDIAN TRIBES COULD NOT EXERCISE CRIMINAL JURISDICTION OVER NON-INDIANS.

Certainly, the Bureau of Indian Affairs in the course of its extensive history has had many shifts of policy. This is particularly true in the period since 1970. There is no doubt that the attitude of the Bureau of Indian Affairs toward the question of whether Indian tribes may exercise criminal jurisdiction over non-Indians has changed in recent years.

Consistently, prior to 1970, the Bureau of Indian Affairs always regarded this question as one requiring an unequivocal

answer in the negative. This position culminated in a 1970 opinion by the Interior Department Solicitor which held, "Indian tribes do not possess criminal jurisdiction over non-Indians. . . ."[9]

Furthermore, one commentator has noted that it has been the long administrative practice of the Department of Interior to counsel tribes that they do not have criminal jurisdiction over non-Indians.[10]

A further example of the Bureau's understanding that Indian tribes do not have criminal jurisdiction over non-Indians is found in 25 C.F.R. § 11.2. In this regulation, promulgated by the Secretary of the Interior, the Secretary established the jurisdiction of the Court of Indian Offenses as extending "over all offenses enumerated in Sections 11.38-11.87 NH, when committed by any Indian, within the reservation or reservations for which the Court is established." 25 C.F.R. § 11.2.

In both Felix Cohen's original *Handbook of Federal Indian Law* and the later revision by the Department of the Interior there is a tacit assumption by the writers that Indian tribes do not have any criminal jurisdiction over non-Indians except in those few instances in which specific treaty provisions granted a tribe this type of criminal jurisdiction. In both works, the discussion of crimes in Indian country committed by non-Indians against Indians is premised upon federal, not tribal criminal jurisdiction.[11]

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9. 77 I.D. 113 at 115 (1970). This opinion has subsequently been withdrawn; however, no opinion or memorandum to the contrary has been published by the Department of the Interior.

10. M. Price, *Law and the American Indian*, at 171-174 (1973).

11. F. Cohen, *supra* at 364-365; Department of the Interior, *Federal Indian Law*, pp. 323-324.

Amici contend that the consistency of this interpretation by the Bureau of Indian Affairs from 1934, the date of the revitalization of tribal governments, through 1970, is of particular import. It is only in recent times that the Bureau of Indian Affairs has moved from a firm policy that no such criminal jurisdiction over non-Indians exists in Indian tribes to an uncertain position. This movement is another example of the uncertainty which plagues the development of effective law enforcement within the confines of Indian reservations. Since there has been no development in case law or statutory change justifying this change of position by the Bureau of Indian Affairs, the traditional position of the Bureau ought to be accorded more weight.

E. THAT NEITHER THE TRIBE'S POWER TO EXCLUDE UNDESIRABLE NONMEMBERS NOR THE DOCTRINE OF IMPLI[illegible] CONSENT HAS ANY APPLICABILITY TO [illegible] QUESTION AT HAND.

In the court below the Tribe attempted to bolster its position by arguing that inherent within its power to exclude undesirable nonmembers was included a power to regulate the conditions under which they entered the reservation. Taking the argument one step further, Respondents argued below that a tribe could require that all persons entering the reservation consent to the tribe's criminal jurisdiction, regardless of whether the person entering the reservation be an Indian or non-Indian or a member of the tribe or a nonmember.

This argument is entirely misplaced, as it attempts to do indirectly that which the Tribe could not do directly. The question involved in this case is essentially one of statutory and treaty construction. Both the federal statutory scheme and the history of federal Indian treaty-making show a consistent understanding that Indian tribes could not exercise criminal jurisdiction over non-Indians, except when such jurisdiction was

explicitly granted by a particular Indian treaty. Thus, not only does the power to exclude *not* necessarily include within itself the power to regulate the conditions of entry, but the entire question is moot, since the federal statutory scheme precludes Indian tribes from exercising criminal jurisdiction over non-Indians.

F. THAT REGULATION OF NON-INDIAN CRIMINAL CONDUCT IS NOT AN ESSENTIAL ATTRIBUTE OF TRIBAL SELF-REGULATION AND THEREFORE FEDERAL INDIAN POLICY CAN BE FULLY ACHIEVED AND PROMOTED WITHOUT A TRIBE HAVING SUCH CRIMINAL JURISDICTION.

The court below states:

> Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a *sine qua non* of the sovereignty that the Suquamish originally possessed. *Oliphant*, *supra*, at 1009.

The Tribe holds a similar viewpoint as to the essential nature of the regulation of non-Indian criminal conduct on the reservation. However, this statement does not stand up under examination of this Court's discussions of tribal self-regulation. As stated in *Williams* v. *Lee*, 358 U.S. 217:

> The question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Id.* at 220, citing *Utah & Northern Ry. Co.* v. *Fisher*, 116 U.S. 28.

Traditionally, the Court's primary concern has been to

delimit areas of conduct which the state could not regulate on the grounds that it would infringe on the right of Indians to govern themselves. Within these areas, tribal rules wholly govern the conduct of tribal members.

Nevertheless, as noted in *McClanahan*:

> Similarly, notions of Indian sovereignty have been adjusted to take account of the state's legitimate interests in regulating the affairs of non-Indians. *McClanahan, supra* at 171.

Furthermore, as discussed in *Williams* v. *Lee*, this Court has distinguished between tribal relations which were of primary importance and those which would be secondary:

> Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained. *Williams, supra* at 219.

Amici agree in principle with the federal Indian policy which seeks to permit Indian tribes to regulate their own essential internal affairs. However, Amici cannot agree with the Respondents that the exercise of criminal jurisdiction over non-Indians by Indian tribes represents an essential Indian interest. First, it must be remembered that in light of 25 U.S.C. § 1302(7), tribal courts have criminal jurisdiction over only minor offenses and cannot impose sentences in excess of six months imprisonment and a five hundred dollar fine; therefore, tribal courts are quite restricted in the type of criminal jurisdiction they can exercise even over their own tribal members. Accordingly, the extension of this limited criminal jurisdiction to nonmembers would not promote any essential Indian interest. Similarly, after discussing the decisions in

Morton v. *Mancari*, 417 U.S. 535 (1974), and *Fisher* v. *District Court*, 424 U.S. 382 (1976), this Court went on to state:

> Both *Mancari* and *Fisher* involve preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. *United States* v. *Antelope*, ____ U.S. ____ , 97 S.Ct. 1395 at 1399 (1977).

Amici submit that the above statement from the Court's recent decision in *United States* v. *Antelope*, is particularly important in the consideration of this case. This Court has distinguished federal regulation of criminal conduct within Indian country from essential Indian interests. There is no essential Indian interest served in the exercise of tribal jurisdiction over non-Indians; accordingly, there is no frustration of federal Indian policy in holding that such jurisdiction does not exist.

G. THAT PUBLIC POLICY REQUIRES EFFECTIVE LAW ENFORCEMENT WITHIN THE BOUNDARIES OF INDIAN COUNTRY AND THAT SUCH EFFECTIVE LAW ENFORCEMENT CAN BE OBTAINED ONLY THROUGH THE COOPERATION OF FEDERAL, STATE, TRIBAL, MUNICIPAL, AND COUNTY GOVERNMENTS IN A STABLE ATMOSPHERE.

Respondents below made much of the difficulty in enforcing its tribal laws in a situation in which non-Indians are not subject to those tribal laws. The majority opinion in the lower court quoted at considerable length from Respondents' brief on this point in the course of its opinion. *Oliphant, supra*

at 1013-1014. Interestingly enough, Respondents' argument to the court below on this point could be turned around and utilized almost word for word had Petitioner Oliphant been an Indian and had the Suquamish Indian Tribe been a nontribal governmental entity. The problems of limited criminal jurisdiction do not exist solely on the side of the Indian tribes. On the contrary, state political subdivisions and states themselves have virtually identical limitations.

The Court should be aware of the fact that, in spite of these jurisdictional limitations, a reversal of the Ninth Circuit Court of Appeals in this case would not create or continue a jurisdictional void. Non-Indian offenses, occurring within the boundaries of Indian country, would continue to be handled by either the federal courts through the Assimilative Crimes Act, 18 U.S.C. 13, or the state or local courts. There exist, within the boundaries of most Indian reservations, functioning units of county government akin to Kitsnap County. Public Law 280 states, these county governments along with other state subdivisions provide the primary law enforcement in these areas. In states not within the purview of Public Law 280, state or local courts have, in fact, exercised such jurisdiction over minor non-Indian offenders regardless of whether the offense is against an Indian or non-Indian. In the case of offenses against non-Indians, the source of such jurisdiction is unquestioned. *United States* v. *McBratney*, 104 U.S. 621 (1881) (cited with approval in *United States* v. *Antelope, supra*, n. 2, 4 and 9) and *Draper* v. *United States*, 164 U.S. 240 (1896). In the case of minor offenses against tribal members, the source of such state jurisdiction is perhaps less clear. Nevertheless, with the passage of the General Allotment Act, 25 U.S.C. 331 *et seq.*, in 1887, Congress contemplated thousands of non-Indians moving within the boundaries of Indian Reservations. Faced with the numerous contacts between Indians and non-Indians as a result of this movement, the result of *McBratney* and *Draper* has been

extended in practice, by both prosecutors and complainants, to encompass minor non-Indian offenses committed against Indian persons. The federal government has acquiesed in the exercise of this jurisdiction for decades. This acquiesence is "a factor entitled to weight as a part of the 'jurisdictional history.'" *Rosebud Sioux Tribe* v. *Kneip*, __ U.S. __, 51 L.Ed. 2d. 660 at 675 (1977). In any event, the Court is not required to decide the propriety of this practice. Whether the jurisdiction over such minor non-Indian offenses against Indians is exclusive to the federal government or concurrent between the federal government and the states, the fact remains that Indian tribes have no such jurisdiction over non-Indian offenders.

Ironically, Petitioner Oliphant following his arrest by the Suquamish Tribe, was housed in the City of Bremerton jail. The Tribe was able to house its prisoner at the city jail because of a cooperative arrangement with the City of Bremerton. It is this type of governmental cooperation which will ultimately provide effective law enforcement between tribes, states and political subdivisions. Mutual agreements as to cross-deputization, extradition, and use of common facilities will provide strong and effective law enforcement on Indian reservations, not the simple extension of tribal criminal jurisdiction to include non-Indians.[12] It is only through this type of intergovernmental cooperation that the difficulties of limited jurisdiction can be

12. The State of South Dakota has attempted to make provision for the establishment of intergovernmental agreements with Indian tribes. The state in 1973 established an Indian-State Task Force to promote such intergovernmental agreements on a wide variety of issues, including taxation, hunting and fishing and law enforcement. See 1973 *Session Laws of South Dakota*, Ch. 331. Later, the state established a state negotiating team to meet with Indian tribes for negotiation of similar agreements. 1975 *Session Laws of South Dakota*, Ch. 8. This method has resulted in the passage of several mutually beneficial statutes including recognition of tribal governments for purposes of intergovernmental cooperation agreements, SDCL 1-24-1(3); extradition agreements, SDCL 23-24B; tax collection agreements, SDCL 10-12A; free license plates for tribal vehicles, SDCL 32-5-42; availability to Indian tribes of surplus state property, SDCL 5-23-32; and exemption of Indian tribes from sales and fuel taxation, SDCL 10-45-10 and 10-48-3.

effectively overcome. To permit one, but not the other, of these governments to have jurisdiction over both members and nonmembers alike would simply exacerbate the tensions which exist on some reservations without providing a solution to the problem. If change in the status quo in this critical area is to be made, such change should come through unequivocal congressional enactment.

CONCLUSION

For the reasons stated, Amici respectfully urge this Court to reverse the decision of the Court of Appeals.

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IN THE

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OF THE

UNITED STATES

October Term, 1976

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1976

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE ATTORNEY GENERAL, STATE OF WASHINGTON

INTEREST OF AMICUS CURIAE

The Attorney General is the chief legal officer of the State of Washington and is participating as amicus curiae because of the substantial impact of the decisions below upon the State of Washington and its citizens. The courts below have concluded that an Indian tribe has all the powers of a sovereign except as restricted by Congress and thus has the authority to criminally charge and try non-Indians

in tribal court for violations of tribal laws. The majority of the three-member panel of the circuit court reached this conclusion by characterizing Indian tribes as governmental entities having all the sovereign powers of a state or the federal government over all persons within a reservation, Indian and non-Indian alike, except to the extent such powers are expressly limited by Congress.

As Justice Frankfurter noted, in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) at page 72:

> "As the United States spread westward, it became evident that there was no place where Indians could be forever isolated."

The accuracy of that statement is dramatically presented in the State of Washington. The Port Madison Indian Reservation, upon which the events giving rise to this litigation occurred, is reasonably typical of the twenty-three Indian reservations in the State of Washington. By air or water, it is within ten miles of the city of Seattle, the state's largest city, with a population in excess of one-half million. The reservation consists of 7,275 acres, of which 63% is privately owned in fee simple absolute, free of any trust held by the United States. Only approximately 1% is tribally owned, and the remaining 36% remains in allotment status with the patent held in trust by the United States. The population of the Port Madison Indian Reservation is 2,928, of which only about 50, approximately one-sixtieth of the population, are members of the Suquamish Tribe. The total tribal

membership is unknown, but it is estimated to be approximately 150, of whom, as we have noted, only 50 live within the reservation.

Within the Port Madison Indian Reservation and the other twenty-two reservations in the State of Washington, thousands of the state's non-Indian citizens reside; and many are employed by businesses located within the reservations. Most of them occupy property which either they have purchased themselves or have acquired from their ancestors. They have acquired homes and created cities within these reservations. For example, the Yakima Reservation, which is located east of the Cascade Mountains, has two cities with populations in excess of 3,000 people within the reservation (Wapato — 3,050 and Toppenish — 6,000). These citizens are not transients, consenting to jurisdiction by temporary presence within an area. These resident citizens are not permitted to participate in the formulation of tribal law, nor do they have any say in the tribal policies, nor in the enforcement and adjudication of tribal ordinances. These citizens, in light of established living patterns, cannot avail themselves of the opportunity "like a tourist" to simply avoid a jurisdictional area.

Nineteen of these reservations are located in Western Washington, which is the population center of our state. Some of these reservations are located within or near large urban areas. For example, the original boundaries of the Puyallup Reservation in-

clude a substantial portion of the city of Tacoma, the state's second largest city.[1]

The State of Washington for a number of years, under the authority expressed by this Court in *U.S. v. McBratney*, 104 U.S. 621 (1882); *Draper v. U.S.*, 164 U.S. 240 (1896); and *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), has exercised criminal jurisdiction over non-Indians who commit crimes against the person or property of other non-Indians within the Indian reservations of this state. More recently, in response to the Congressional authorization in Public Law 83-280 permitting the state to assume jurisdiction over Indian reservations, we have enacted chapter 240, Laws of 1957. That act provides that upon the petition of the governing body of the tribe the state will assume full jurisdiction to the extent authorized by Public Law 280. In response to that federal and state legislation, nine[2] tribes petitioned for, and the state accepted and has

[1]The original Puyallup Reservation encompassed some 18,000 acres of which all but approximately 33 have been transferred to non-Indian ownership. While the Ninth Circuit Court of Appeals resurrected the reservation, there remains the unsettled question as to whether the original boundaries are still intact or whether the reservation may have been diminished in size. See, *U.S. v. Washington*, 496 F.2d 620 (9th Cir. 1974), cert. den. 419 U.S. 1032, and *Puyallup Tribe, Inc. v. Dept. of Game of the State of Washington*, ... U.S. ....., 97 S. Ct. 2616, 2621, fn 11 (June 23, 1977).

[2]Two of the tribes which originally petitioned for jurisdiction under the 1957 act subsequently requested and the governor granted proclamations of retrocession which were thereafter accepted by the federal government. For those two tribes, the Quinault and the Suquamish, the state's jurisdiction is exercised pursuant to the 1963 state jurisdictional act. The Governor of the State of Washington does not have the power to retrocede jurisdiction but may correct an error in the original proclamation assuming jurisdiction, AGO 1972 No. 9 (April 17, 1972). The "retrocession" of jurisdiction over the Quinault was for the correction of an error, but no error was involved with acquisition of jurisdiction over the Suquamish. Therefore, as a matter of state law, the Governor could not legally retrocede jurisdiction over the Suquamish Port Madison Reservation.

exercised, full jurisdiction. Subsequently, in 1963 the Washington state legislature enacted chapter 36, Laws of 1963, whereby the state undertook the responsibility for *full jurisdiction without the necessity of petition by the governing body of the tribe for all non-Indians within the boundaries of a reservation.* Further, the state commenced the exercise of full and complete jurisdiction over tribal members for the purposes of compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads and highways. The state also assumed complete and full jurisdiction over tribal members for all other purposes within the reservation except for acts that occurred on tribal or allotted lands.

Pursuant to both the state 1957 and 1963[3] acts, which were authorized by Congress (Public Law 83-280), the State of Washington has consistently exercised full and complete jurisdiction over all non-Indian acts that occur within the Indian reservations in this state. This assumption of jurisdiction has been a matter of exclusive jurisdiction as is reflected in the Washington Attorney General Opinion, AGO 63-64 No. 68 (November 8, 1963).

[3]An appeal is currently pending with this Court from the Ninth Circuit determination in *Confederated Bands and Tribes of Yakima Indian Nation v. Washington*, 550 F.2d 443 (1977), wherein the Ninth Circuit invalidated the state's exercise of jurisdiction pursuant to Public Law 83-280 by this 1963 state enactment.

SUMMARY OF ARGUMENT

We have examined the complete, thorough and comprehensive briefs of the petitioners and the amicus curiae, Kitsap County. We concur, support and endorse the arguments set forth therein, and our arguments in this brief will seek to avoid duplication and repetition. We emphasize that the absence of such duplication does not reflect disagreement with the position set forth in those briefs.

As a description of the present legal status of Indian tribes, the term "tribal sovereignty" is a legal misnomer. Under our system of government, there are only two types of true sovereigns, the federal government and the states. *U.S. v. Kagama*, 118 U.S. 375 (1886).

As a description, however, of the past status of Indian tribes, the concept of tribal sovereignty retains vitality; for it establishes the basis for the special relationship between Indians and the federal government which validates otherwise constitutionally objectionable special treatment of Indians by the federal government, but that is all it does. The concept does not, independently of federal statutes or treaty provisions, provide a valid basis for any assertion of tribal jurisdiction over non-Indians.

Moreover, the "sovereignty" which the tribes historically have exercised was purely personal rather than territorial in scope; i.e., it was limited to tribal members and thus amounted to what is best described as "tribal self-government," and not "tribal

sovereignty." The fundamental error of the majority opinion of the court below was to overlook this distinction.

The pattern of Congressional action in this century, as established by the Indian Reorganization Act in 1934 and the Indian Civil Rights Act of 1968, was premised on this distinction. Congress has not only refused to confer upon Indian tribes criminal jurisdiction over non-Indians, but it has acted upon the assumption that no such jurisdiction exists.

Should this Court find that such jurisdiction exists, the exercise of it by Indian tribal courts would violate fundamental constitutional rights of non-Indians.

ARGUMENT

I.

THE LIMITED FUNCTION OF "TRIBAL SOVEREIGNTY" AS APPLIED BY THIS COURT

In the absence of Congressional authorization the concept of "tribal sovereignty,"[4] as developed and applied by this court, does not provide any basis for the assumption of criminal jurisdiction by an Indian tribe over non-Indians. The sole function of the concept is to provide a basis for validating federal statutes which grant special treatment to Indians, including those federal statutes which confer upon Indian tribes the authority to regulate the conduct of non-Indians. Because no federal statute or treaty provision exists which authorizes the Suquamish Tribe's assertion of jurisdiction over non-Indians, such jurisdiction does not exist in this case.

In *U.S. v. Kagama*, 118 U.S. 375 (1886), this Court upheld the validity of the Major Crimes Act (now codified as 18 USC 1153) against the contention that it violated Indian tribal sovereignty. *Kagama* presented the strongest possible case for the claim of tribal sovereignty since it involved the murder of an Indian by two other tribal members within the boundaries of the Hoopa Valley Indian Reservation. In rejecting the claim, this Court stated:

"But these Indians are within the geographical

[4]See, infra at pp. 17-23 for a discussion of the distinctions between tribal self-government sometimes referred to as "tribal sovereignty" as contrasted with the traditional sense of "sovereignty."

> limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from or exist in, subordination to one or the other of these. * * *" (Emphasis supplied) (*Supra* at 379)

What vitality remains, then, in the concept of "tribal sovereignty"? As shown by *Kagama, supra*, it cannot be used as a shield to ward off assertions of criminal jurisdiction over Indians by the federal government. Can it be used as a sword to reach non-Indians; i.e., to support, independently of any federal authorization, an assertion of tribal criminal jurisdiction over non-Indians? We submit that it cannot.

The concept has been invoked often as a shield to ward off assertions by the states of jurisdiction over Indians. Two recent instances are *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In the former case, involving an assertion of state taxing jurisdiction over an Indian on the Navajo Reservation, the tax was held invalid. In the latter case, involving an assertion of state taxing jurisdiction over the off-reservation activities of an Indian tribe, the tax was sustained.

Notwithstanding the differences in result in those cases, the same approach was taken. The legal analysis by this Court focused on specific treaty pro-

visions and statutes, not on general amorphous concepts of "tribal sovereignty." This is reflected by the following quotation from *Mescalero:*

> [W]e reject * * * the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land." Generalizations on this subject have become particularly treacherous. The conceptual clarity of * * * Marshall's view in *Worcester v. Georgia*, * * * has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. 411 U.S. (Supra at 147, 148.)

The same sentiments were expressed even more bluntly in McClanahan:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. * * * The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. (411 U.S. at 172.)

This Court noted that Indian sovereignty as a doctrine was relevant only as a "backdrop" against which treaties and statutes must be read. (411 U.S. at 172) Federal preemption of the field was such that the issue of residual Indian sovereignty was moot and "generally of little more than theoretical importance. * * *" (411 U.S. at 172, note 8)

Even as a shield to be used against the state, "platonic notions" of "tribal sovereignty" retain little, if any, vitality.

The concept retains, however, considerable vitality in another area. It forms the basis for fending off attacks, generally mounted on constitutional grounds such as the equal protection clause, as incorporated by the due process clause, against federal legislation granting special treatment to Indians. This is shown by four recent decisions of this Court involving such attacks. The first is *Morton v. Mancari*, 417 U.S. 535, (1974), in which this Court referred to Indians as "* * * members of *quasi*-sovereign tribal entities. (*Supra* at 554)

The 1934 Indian Reorganization Act (48 Stat. 984) provided an employment preference for Indians in the Bureau of Indian Affairs. That preference was challenged as being contrary to the 1972 Equal Employment Opportunity Act (86 Stat. 111) and as violating the equal protection component of the due process clause. After rejecting the contention that the 1934 employment preference had been repealed by implication by the 1972 act, this Court then considered the constitutional challenge.

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an en-

> tire Title of the United States Code (25 USC) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." (*Supra* at 552)

This Court then proceeded to identify the rationale which validates such federal laws including the employment preference with the BIA:

> "The preference, as applied, is granted to Indians not as a discreet racial group, but, rather, as members of *quasi*-sovereign tribal entities whose lives and activities are governed by the Bureau of Indian Affairs in a unique fashion." (*Supra* at 554) (Emphasis supplied)

It is important to note that in referring to "tribal sovereignty" as the basis for validating the federal action this Court's observation was that tribal entities are *quasi*-sovereign, not purely "sovereign" entities.

A second recent occasion upon which this Court has considered similar attacks is *U.S. v. Mazurie*, 419 U.S. 544 (1975), in which this Court, expressly hearkening back to *Worcester v. Georgia*, 31 U.S. 515 (1832), stated:

> "* * * Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory * * *" (419 U.S. at 557)

But again we must examine the precise role which the concept of sovereignty played in the case.

Mazurie, a non-Indian, was convicted in federal court of introducing spirited beverages into Indian country (the Wind River Reservation, Wyoming) in

violation of 18 USC 1154. In 1953, Congress had passed local option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country so long as state law was not violated (18 USC 1161). Mazurie operated the Blue Bull Bar which, although within the reservation, was located on land owned in fee by non-Indians. The tribe had denied a renewal of Mazurie's license, but he continued to sell without it.

He was tried and convicted for a violation of 18 USC 1154. The Court of Appeals for the Tenth Circuit reversed the conviction. 487 F.2d 14 (1973). The reversal was based on the conclusion that "* * * the purported delegation of authority to the tribal officials contained in 18 U.S.C. § 1161 * * *" was invalid. 487 F.2d at 19. In so holding, the circuit court referred to the Wind River Tribes as a "private, voluntary organization, which is obviously not a governmental agency * * *" Ibid. This Court recognized that this characterization of the tribes was the heart of the rationale of the Court of Appeals' decision. 419 U.S. at 557. But in citing *Worcester, supra*, this Court characterized the tribes as more than private, voluntary organizations, and thus found a sufficient basis to sustain the Congressional delegation of power to the tribes.

Most recently, in *U.S. v. Antelope*, ... U.S. ..... 51 L. ed 2d 701 (1977), this Court, relying upon the language quoted from *Mancari* and *Mazurie*,

sustained the validity of the Major Crimes Act, 18 USC 1153, against an argument that it racially discriminated against an Indian who had committed murder on a reservation located within the State of Idaho. When the defendant, Antelope, was convicted in federal court, he was subject to the felony murder rule. The State of Idaho does not as a matter of state law have the felony murder rule. Thus, if a non-Indian had committed the same crime; i.e., the killing of a non-Indian within the reservation, he would not have been subject to the felony murder rule because the non-Indian would have been tried in an Idaho state court.

In sustaining the conviction of the Indian for felony murder, this Court rejected the argument that he was subject to racial discrimination, stating:

> "Federal regulation of Indian tribes, therefore, is governance of *once-sovereign* political communities; it is not to be viewed as legislation of a 'racial group consisting of "Indians".'" [Citing Mancari] (Emphasis supplied) (*Supra* at 707)

Past sovereignty is enough to overcome the equal protection hurdle. More importantly, this past sovereignty provides the basis for a valid exercise of *Congressional* power, but not the basis for an independent exercise of tribal power, unauthorized by Congress. Vestiges of this past sovereignty still exist, but only for the purpose of providing a basis for federal statutes and treaties relating to Indians, which would otherwise be invalid. Such "sovereignty," as

Kagama reminds us, really isn't sovereignty at all.

In *Antelope, supra*, this Court relied on another recent decision which is of special importance because it dealt with the source of the powers of a tribal court. *Fisher v. District Court*, 424 U.S. 382 (1976), involved an adoption dispute between Indians which culminated in a jurisdictional dispute between an Indian court system and a state court system. All parties to the adoption dispute were members of the Northern Cheyenne Tribe and residents of that tribe's reservation in Montana.

This Court held that the tribal court, rather than the state court, had jurisdiction over the adoption proceedings. In so holding the Court found that the denial of access by tribal members to Montana courts for the adoption of an Indian child did not constitute impermissible racial discrimination against the would-be adoptive parents, because the exclusion is based on the jurisdiction of a quasi-sovereign tribe under federal law. The Court found the tribal court's power over the adoption proceedings to be derived from a specific federal statute, 25 U.S.C. 476, and not from any general concept of "tribal sovereignty." Just as in *Mancari*, *Mazurie* and *Antelope*, the concept of tribal sovereignty was used only defensively; i.e., as the basis for sustaining the constitutionality of the exclusive jurisdiction which the Congress had granted the tribal court.

As stated by the Court:

"In 1935, the Tribe adopted a constitution and

bylaws pursuant to § 16 of the Indian Reorganization Act, 48 Stat 987, 25 USC § 476, a statute specifically intended to encourage Indian tribes to revitalize their self-government. Mescalero Apache Tribe, supra, at 151, 36 L Ed 2d 114, 93 S Ct 1267. *Acting pursuant to the constitution and bylaws*, the Tribal Council of the Northern Cheyenne Tribe established the Tribal Court and granted it jurisdiction over adoptions "among members of the Northern Cheyenne Tribe." (424 U.S. at 387)

The Indian Reorganization Act was critical in meeting the arguments against tribal court jurisdiction, because it provided the source of that jurisdiction:

"* * * The Runsaboves [the would be adoptive parents] argue that the ordinances of the Northern Cheyenne Tribe could not deprive the Montana courts of the jurisdiction they exercised over tribal matters prior to organization of the Tribe in 1935. The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 USC § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe, a question we do not decide, that jurisdiction has now been preempted." (424 US at 390)

The Court then took up the equal protection issue, referred to the "quasi-sovereign" status of the tribe, and, with a further citation to *Mancari*, upheld the tribal court's exclusive jurisdiction against the constitutional attack.

The pattern established in *McClanahan*, *Mescalero*, *Mancari*, *Mazurie*, *Antelope*, and *Fisher* is consistent: Tribal sovereignty is a concept used by the Court to uphold the power of Congress to treat Indians differently from other citizens but, independent of Congressional action as embodied in a statute or treaty, the concept does not confer legal powers or immunities upon a tribe or its members, and it remains just a "platonic nation" for other purposes. *McClanahan, supra* at 172.

II.

THE DISTINCTION BETWEEN TRIBAL SOVEREIGNTY AND TRIBAL SELF-GOVERNMENT

Tribal "self-government" and "sovereignty" in the traditional sense are not interchangeable terms. The interchangeable use of those terms leads to confusion and resulted in the majority opinion of the circuit court setting forth an invalid premise; i.e., that a tribe has all the traditional elements of "sovereignty" except as limited by federal law.

Tribal self-government refers to a tribe's authority over its own members, whereas traditional sovereignty is an exercise of jurisdiction over a territorial area and all persons within it. These concepts are discussed in Cohen, *Handbook on Federal Indian Law*, (Univ. of New Mexico Ed.) pp. 358-360. Quoting from a ruling by the Solicitor of the Interior Department, April 27, 1939, it is there noted that

we must "* * * beware of reading into the measure of this [Indian] jurisdiction the common-law principle of territoriality of criminal law." *Supra* at 360. In establishing the source and scope of the Indian tribe's authority for self-government which derives from

> "* * * the unextinguished fragments of tribal sovereignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons." (*Supra* at 360)

This critical distinction, which the solicitor warns us not to overlook, was completely disregarded by the majority opinion in the court below.[5]

The emphasis upon personal rather than territorial is also reflected by the following quotations:

> "If, then, an Indian court is to be considered a judicial organ of Indian tribal sovereignty, he must recognize that this sovereignty is not strictly territorial sovereignty, but primarily a personal sovereignty." (*Supra* at 361)

> "Ordinarily offenses committed by a non-Indian against a non-Indian in the Indian country are of no concern to the Federal Government and are punishable by the state. For purposes of criminal jurisdiction, where Indians are not involved, an Indian reservation is generally considered to be a portion of the state within which it is located." (*Supra* at 365)

[5]To an American lawyer "sovereignty" which is only "personal," and not "territorial," is a strange sort of sovereignty. Indeed, it is not "sovereignty" at all, and is best described as what it really is, "tribal self-government," extending only to tribal members.

This distinction between territorial and personal sovereignty — i.e., between true sovereignty and tribal self-government — was recognized but not verbalized by this court in *United States v. McBratney*, 104 U.S. 621 (1882). The defendant, McBratney, killed Casey, neither of whom was an Indian, within the boundaries of the Ute Indian Reservation in Colorado. Notwithstanding the fact that the offense occurred within the reservation, this court held that the state of Colorado had jurisdiction over the offense and that the state court was the proper forum for the criminal proceeding.

The rationale for this conclusion was more explicitly stated in *Draper v. United States*, 164 U.S. 240 (1896). Within the Crow Indian Reservation in Montana, Draper, who was not an Indian, killed another non-Indian. When Montana was admitted to the Union, its enabling act provided that:

> "Indian land shall remain under the absolute jurisdiction and control of the Congress of the United States * * *" (*Supra* at 244)

This court, after considering whether that provision in the enabling act created a jurisdictional enclave within the state of Montana within which Montana statutes could not apply, stated:

> "It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted to the Union adequately explains the use of the words relied upon, and demonstrates that in reserving to the United States jurisdiction and control over In-

dian lands *it was not intended to deprive that state of power to punish for crimes committed on a reservation or Indian land by other than Indians or against Indians.* * * *" (Emphasis supplied) (*Supra* at 247)

More recently, in a situation similar to the Port Madison Indian Reservation in this proceeding, this court considered the Allegheny Reservation in New York, having a population of approximately 9,000 with only eight Indian families. Donald Ray was convicted in New York state court for a murder within the reservation. Neither Ray nor the victim was an Indian. The contention was rejected by this court in *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946), that the state lacked jurisdiction over the offense. The court concluded that the state of New York had jurisdiction, even within the boundaries of the reservation, over crimes committed by non-Indians against non-Indians.

These three cases have been cited not to establish the state's jurisdiction over non-Indians for criminal offenses, which is already well-established, but rather to reflect that in all three cases this Court found that the reservation was within the territorial limits of the respective states. Thus, the states had a territorial jurisdiction to the extent that the same was not preempted by the United States. The limited nature and extent of the United States' preemption of jurisdiction in those cases is consistent with the concept of tribal jurisdiction over tribal members and their property. If the tribal interest had been con-

ceptualized as territorial rather than personal jurisdiction these cases would have presented a conflict between tribal and state jurisdiction. The resolution in all three cases that the state had jurisdiction over crimes committed by non-Indians against other non-Indians within the boundaries of an Indian reservation was a clear recognition of territorial jurisdiction by the state in contrast to a personal jurisdiction of the tribe over its members.

The concept of personal jurisdiction over tribal members without specific Congressional authorization is reflected in decisions of this Court. In *U.S. v. Quiver*, 241 U.S. 602 (1916), two members of the Sioux Tribe were charged in federal court with having committed adultery within the reservation. In dismissing on the basis of the lack of federal court jurisdiction for a prosecution under federal law, this Court stated, *supra* at 603-604:

> "At any early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian Intercourse Acts of 1796 [citation omitted], and * * * 1802 [citation omitted], provided for the punishment of various offenses by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other, * * *"

While the tribe retained personal jurisdiction over its members, this quotation makes it clear that

the tribe did not have jurisdiction over non-Indians within its reservation — jurisdiction which would have existed if the tribe had territorial sovereignty.

A similar statement was made in *Kagama*, *supra*, at 381-382:

> "* * * They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their *internal and social relations*, and thus far not brought under the laws of the Union or of the State within whose limits they reside." (Emphasis supplied)

This reference to "internal social relations" clearly relates to jurisdiction in the personal sense over tribal members.

The Solicitor of the Department of Interior (77 I.D. 113 (August 10, 1970)) reached the conclusion:

> "* * * Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or Federal governments." (*Supra* at 115) (The opinion is set forth in the appendix to this Brief, pp. 1A-5A)

Subsequently the opinion has been cited with approval for the lack of tribal criminal jurisdiction over non-Indians. 78 I.D. 229 at 230:

> "* * * the criminal penalties imposed by the [tribal] ordinance would not be applicable to non-Indians, since Indian tribes generally do not possess criminal jurisdiction over non-Indians."

This view is fully in accord with an opinion of

the Attorney General of the United States which was issued contemporaneously with the signing of the Treaty of Point Elliott (12 Stat. 927) with the Suquamish and other tribes in Washington. That opinion (7 Op. AG 174 (May 23, 1855)) stated that the Choctaw Tribe did not have criminal jurisdiction over a non-Indian even though he lived with the tribe and was married to a tribal member. However, in a dispute, between the father and children following the death of the Indian spouse, over Indian property which under tribal law was the property of the deceased Indian spouse was within the tribe's jurisdiction. This reflects tribal jurisdiction over tribal members and their property, since as noted under tribal law all of the property was that of the tribal spouse.

The majority opinion in *Oliphant*, *supra*, refers to 77 I.D. 113 having been withdrawn as of January 25, 1974, but it is not noted in Sheppard's citations nor are any reasons cited for withdrawal. We submit the opinion is correct and is consistent with the concept that a tribe's self-government only extends to its own members unless expressly expanded by Congressional action.

III.

THE JUDICIAL FOUNDATION OF PLENARY CONGRESSIONAL POWER OVER INDIANS IN *WORCESTER V. GEORGIA* AND THE CONGRESSIONAL EXERCISE OF THAT POWER IN PRESERVING LIMITED TRIBAL SELF-GOVERNMENT

The leading case often cited for the proposition that an Indian tribe possesses the attributes of a sovereign power is *Worcester v. Georgia*, 31 U.S. 515 (1832), authored by Chief Justice Marshall. Before discussing that decision, another decision by Justice Marshall in the preceding year must be noted, *The Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

The State of Georgia had extended its laws to Cherokee Indian areas and had annulled tribal ordinances, the practical effect being to parcel out Indian lands. The tribe brought an original action in the United States Supreme Court against the State of Georgia. In ruling upon that application for original jurisdiction, the court determined that the Cherokee Tribe was not a "state" nor was it a "foreign nation" within the supreme court's original jurisdiction provided by Article III, § 2 of the United States Constitution. Although the Cherokees were referred to as being a nation, the court made clear that they were not a foreign nation and they were not to be equated with a state of the Union which possesses sovereign powers.

The following year, in *Worcester, supra*, a jurisdictional dispute between the federal government and the State of Georgia was presented. Worcester, a missionary from the State of Vermont, pursuant to a license issued by the United States government was active in missionary activities within the Cherokee area. The State of Georgia purported to regulate by statute those individuals who could live within the Cherokee Indian country. Thus, the case clearly presented a conflict between an action specifically authorized by the United States government and denied by the state government. Justice Marshall, consistent with his earlier opinions, favored the national power over that of the state and thus found that the State of Georgia was interferring with intercourse with the Cherokee Nation, which was exclusively reserved to Congress by the United States Constitution, Article I, § 8. While the court referred to the Cherokee Nation, and referred to its sovereignty, it is important to note that the United States' treaty with the Cherokee specifically permitted the Cherokee Tribe to exercise sovereign powers to govern its members and all persons within its territory. *Supra* at 538. Thus, the sovereignty which Justice Marshall made reference to was one which was specifically conferred by an action of the United States government, and was not some form of inherent sovereignty that can be relied upon by the tribe as authority to exercise all the powers of a sovereign.

Consistent with our earlier discussion, infra pp.

8-17, *Worcester* does not judicially recognize full blown tribal sovereignty to support the exercise of tribal powers, but rather it reflects the validation of a power exercised by the United States which is justified by the existence of the Cherokee Tribe. This construction of *Worcester* is consistent with the modern pronouncements of this Court wherein *Worcester* has been considered. For example, in *McClanahan*, *supra* at 172, "* * * the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."

This is also consistent with the 1934 Indian Reorganization Act (48 Stat. 984) which this court observed in *Mancari*, *supra*, at 547:

> "* * * was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically, * * *"

When the Wheeler-Howard Indian Reorganization Bill was introduced in 1934 (HR 7902 and S 2755, 73rd Congress, 2nd Sess.), it included the following specific power for tribes organizing under that bill:

> "to organize and act as federal municipal corporations, to establish a form of government, to adopt and thereafter amend a constitution, and to promulgate and enforce ordinances * * * and [to exercise] any other function customarily exercised by local government."

Notably no such provision was included in the revised bill (S 3645) which was subsequently enacted

as the 1934 Indian Reorganization Act. Why would Congress even consider specifically granting such sovereign powers to a tribe if the tribes already possessed them? The answer is simple. The draftsmen of the measure were attempting to create such powers but Congress refused to accede to that request. See, 70 Mich. Law Rev. 955 (1972), and 51 N.D. Lawyer 600, at 612-613 (1976).

A similar Congressional view is evidenced by the 1968 Indian Bill of Rights which is part of the 1968 Civil Rights Act (PL 90-284). The object of the Indian Bill of Rights was to protect individual Indians who were tried for offenses in tribal court as they were already protected by the Constitutional Bill of Rights in state and federal courts. Representative Reifel observed that the object was "first, to create a Bill of Rights for the protection of Indians tried by tribal courts, * * *" (114 Cong. Rec. 9111)

Senator Erwin who sought to incorporate the full constitutional Bill of Rights as part of the act noted in his report that he "* * * sought to extend constitutional rights to the American Indians * * *" (1968 U.S. Code Cong. & Ad. News at 1864) and Congressman Meeds noted at 114 Cong. Rec. 9596 with reference to the 1968 Indian Bill of Rights "the provisions of the Bill of Rights are not identical to the Federal Constitutional Bill of Rights, and the differences are largely in order to accommodate tribal customs."

All of these and other comments in the Con-

gressional Record reflect a concern with protecting Indians from abuses by tribal court—none mention any concern with non-Indians. The reason is obvious. Congress believed that the tribal courts did not have criminal jurisdiction over non-Indians.

IV

CONSTITUTIONAL BILL OF RIGHTS

This Court has previously held that the constitutional Bill of Rights does not apply to tribal court proceedings (*Talton v. Mayes*, 163 U.S. 376 (1896)) and to the extent that a modified version now applies, it is due to the passage of PL 90-284 (1968). If the Court concludes that tribal court has criminal jurisdiction over non-Indians, we believe that this Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957), is pertinent to the present litigation. Two cases were combined. Mrs. Covert killed her husband, an Air Force sergeant, while stationed at a military base in England. In the companion case, Mrs. Smith killed her husband, who was in the United States Army, at a military post in Japan. Both of these spouses were tried in military court for the homicides. Congress had explicitly provided in the Code of Military Justice that such spouses were subject to the jurisdiction of the military court. Further, the United States had an executive agreement with Britain and with Japan which provided that the U.S. military courts had exclusive jurisdiction over U.S. military and their dependents (*supra* at 15). In considering the *Reid* case, this Court observed:

> "* * * In view of our heritage and history in the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomolous to say that trial before a civilian judge by an independent jury picked from the common citizenry are not fundamental rights." *Supra* at 10.

Further,

> "* * * The most transcendant privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Supra* at 9-10.

This Court concluded that the constitutional rights of United States citizens protect them from actions by the United States government even when our citizens are abroad. Considering the constitutional right to a jury trial which is not available under the military code of justice, the court found that the federal legislation which attempted to make military dependents subject to the military court was invalid. The court further considered the executive agreements with Great Britain and Japan, which also provided for U.S. military courts having exclusive jurisdiction over military dependents. The court observed that treaties (i.e., the executive agreements) had to meet the same constitutional standards that would apply to the federal government insofar as their impact upon American citizens. Thus, those agreements could not be used as a basis for conferring jurisdiction upon the military courts. We believe that it is consistent with the

Reid decision to conclude that the United States government could not, by treaty with Indians within the territorial limits of the United States, provide that those tribal entities would have jurisdiction to criminally try non-Indians for acts that occurred within the reservation.

We submit that it would be equally improper under the *Reid* decision to conclude that the United States government in executing treaties with the Indian tribes could by indirection, i.e., simply making no mention in the treaties, accomplish that which would be impermissible for specific inclusion, i.e., the conferring of jurisdiction upon the Indian tribes to try non-Indians in Indian forums for criminal offenses.

CONCLUSION

The most recent federal court decision cited by both the majority and the dissent relative to the jurisdiction of an Indian tribe over non-Indians is a decision in 1878, *Ex parte Kenyon*, 14 Fed. Cas. 353 (C.C.W.D. Ark.) Kenyon had been convicted in the Cherokee tribal court for larceny and sought by habeas corpus to challenge the jurisdiction of that tribal court. Kenyon had been married to a Cherokee for six years and had lived on the reservation during that marriage. Upon his wife's death, he left the reservation taking with him a horse that had belonged to his wife. He was charged in tribal court with the removal of that property. The federal court recognized that there was a possibility that Kenyon

had become a member of the Cherokee tribe by virtue of his marriage and his living on the reservation. Nothwithstanding that possibility, the court concluded that at the time of his arrest, he was a resident of Kansas and of the United States and was not a tribal member either by not having become one or, if so, he had abandoned that status. The court concluded he was therefore not subject to tribal jurisdiction since tribal courts only have jurisdiction over tribal members committing an act against another tribal member.

While the *Kenyon* case is not a decision of this Court, it has represented the law on this subject for nearly 100 years. As we previously indicated, that ruling is consistent with the 1855 opinion of the Attorney General of the United States, consistent rulings by the solicitor of the Department of Interior, the understanding of Congress in enacting Indian legislation, and with the views expressed by this Court in prior opinions, including *Kagama*. As a result, there has not been litigation in which a tribe has sought to assert criminal jurisdiction over a non-Indian for an act occurring within a reservation. As both the majority and dissent indicated in *Oliphant*, this decision by the Ninth Circuit now finding such jurisdiction to exist is new, novel and without precedent. We further submit that if such jurisdiction is found to exist, it presents the constitutional problems discussed with reference to *Reid v. Covert*, wherein the full protections of the constitutional Bill of Rights would be denied to American citizens.

We respectfully submit that the Ninth Circuit decision should be reversed.

DATED this 8th day of September, 1977.

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I hereby certify that on this 8th day of September, 1977, three copies of Brief of Amicus Curiae Attorney General, State of Washington, were mailed, postage paid to Robert H. Bork, Solicitor General, Room 5143 Justice Building, Washington, D.C., and to each of the following:

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CRIMINAL JURISDICTION OF INDIAN TRIBES OVER NON-INDIANS

Indian Tribes: Generally—Indians: Criminal Jurisdiction: Law and Order—Statutes

Indian tribes generally do not possess criminal jurisdiction over non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials.

M-36810 August 10, 1970

To: SECRETARY OF THE INTERIOR.

Subject: CRIMINAL JURISDICTION OF INDIAN TRIBES OVER NON-INDIANS.

You requested, by furnishing this office a copy of your memorandum of March 9, 1970, to the Vice President, that we review the problems of state taxation on Indian reservations and tribal jurisdiction over non-Indians. We have undertaken in this memorandum a review of tribal criminal jurisdiction over

non-Indians.[1] We will consider the state taxation matter in a later memorandum.

The question of criminal jurisdiction of an Indian tribe over a non-Indian was ruled on in *Ex parte Kenyon*, 14 Fed Cas. 353 (No. 7720) (C.C.W.D. Ark., 1878). The court in that case denied tribal jurisdiction of a Cherokee court over a non-Indian accused of theft. Citing Revised Statutes of 1873, section 2146, the Court of *Kenyon* stated in part:

> * * * if there was any crime committed, at any time, it was committed not only beyond the place over which the Indian court had jurisdiction, but, at the time it was committed, by one over whose person such court did not have jurisdiction; because to give this court jurisdiction of the person of the offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian.[2]

Revised Statutes Section 2146, *supra*, provides:

[1]It should be noted that the question of tribal jurisdiction discussed in this memorandum relates to action by tribes in the exercise of remaining sovereign authority and does not relate to Courts of Indian Offenses which are courts established by the Secretary and by the provision of 25 CFR Part 11 exercise over Indians only. See *United States v. Clapox*, 35 Fed. 575 (D.C. Ore. 1888). Further, not all Indian groups organized under the Indian Reorganization Act, 48 Stat. 987, retained sovereign authority if they were not recognized as sovereign prior to being reorganized. See *Federal Indian Law*, Interior Department (1958), p. 411, fn. 36. In organizing under written constitutions most tribes have limited criminal jurisdiction of their laws and courts to Indians.

[2]*Accord, Ex parte Morgan*, 20 Fed. 298, 308 (D.C.W.D. Ark (1883)) also based upon construction of R.S. Sec. 2146. Though this and the 1855 opinion of the Attorney General, *infra*, suggest that Indian tribes do not have jurisdiction over members who commit offenses against non-Indians, the practice and interpretation given Section 1152, United States Code, Title 18, has been to recognize jurisdiction of tribes over offenses by tribal members against non-Indians. See *Federal Indian Law*, Interior Department (1958) pp. 447-448; 55 I.D. 14, 58.

> Sec. 2146 The preceding section [extending the general laws of the United States to Indian country] shall not be construed to extend to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offense, is or may be secured to the Indian tribes respectively.

Section 2146 derived from section 25 of the Act of June 30, 1834, 4 Stat. 729, 733.[3] Section 25 of the 1834 Act was construed by the Attorney General as excluding criminal jurisdiction over non-Indians. See 2 Op. Atty. Gen. 693 (1834) at page 695:

> * * * the 25th section of the act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person and property of another; thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves.

See also 7 Op. Atty. Gen. 174 (1855) at page 179:

> * * * the Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own

[3]That section reads as follows:
"Sec. 25. *And be it further enacted;* That so much of the laws of the United States as provided for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian."

> laws, "any white man" who shall come into the nation, and infringe any of their national regulations (Art. 4). But Congress did not accede to this request. On the contrary, it has made provision, by a series of laws, for the punishment of crimes affecting white men, committed by or on them in the Indian country, including that of the Choctaws, by the courts of the United States. (See act of June 30, 1834, iv Stat. at Large, p. 729, and act of June 27, 1844, v. Stat. at Large p. 680.) These Acts cover, so far as they go, all crimes except those committed by Indian against Indian.

Section 2146 was incorporated in Section 1152 of Title 18, United States Code.[4]

Where the provisions of a statute are carried forward and embodied in a codification in the same, or substantially the same words, the latter provision is considered a continuance of the former statute and of the policy and the interpretations given that statute. 82 C.J.S. *Statutes* sec. 276. It is my conclusion, therefore, that unless there still remains in force a treaty provision whereby a tribe acquired "*exclusive jurisdiction over such offense*" as provided by Section 1152, Indian tribes generally do not possess criminal jurisdiction over non-Indians.

Though the statute, 18 U.S.C. sec. 1152, retains

[4]See reviser's note. Section 1152, Title 18, U.S. Code provides:
"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

that reference to exclusive tribal jurisdiction acquired by treaty it is doubtful that any such jurisdiction which may have been vested in a tribe has survived. It is interesting, in this regard, to note that the Cherokee treaty of 1791, 7 Stat. 39, included this provision:

> If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they may please.

That provision was amended by the treaty of February 27, 1819, 7 Stat. 195, which provided that "white intruders" were to be proceeded against by the United States in accordance with the provisions of the Trade and Intercourse Act of 1802, 2 Stat. 139. Similarly, though by the provisions of some early treaties required tribes to seize and surrender trespassers or "badmen" to designated Federal officials. While we have not made an exhaustive survey of treaties with respect to provisions granting criminal jurisdiction over non-Indians, and therefore subject to the possibility that in a rare instance such jurisdiction may have survived, the answer to the question posed by the members of the National Council on Indian Opportunity must be that Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or Federal governments.

MITCHELL MELICH,
Solicitor.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR AMICUS CURIAE KITSAP COUNTY

STATEMENT OF INTEREST OF AMICUS CURIAE

The Prosecuting Attorney for Kitsap County believes that this appeal raises important questions concerning the right of non-Indian citizens of the United States residing on the Port Madison Reservation in Kitsap County in the State of Washington to be subject to the lawful jurisdiction of the State of Washington. It is the duty of the Kitsap County Prosecutor, an elected official, to enforce the laws of the State of

Washington to their full extent on the Port Madison Reservation. Kitsap County is not now and never has been a party to this suit.

The Port Madison Reservation covers approximately 7,300 acres of land in northern Kitsap County. Less than one percent of the total land area of the reservation is held in trust status by the Suquamish Tribe. Approximately 63 percent of the land area of the reservation is held in non-trust or unrestricted fee patent. Approximately 36 percent of the total land area of the reservation is held by individual Indians in restricted fee status. (R. 53, Map No. 4).

Between 50 and 173 Suquamish Indians are disbursed throughout the Port Madison area, living among 3,000 non-Indian residents on a fee patent reservation. (A. 45, 47, N. 9, *infra*). At least 750 of the residents of the reservation have objected to the exercise of tribal jurisdiction over them by signing a petition. (Appendix A)

STATEMENT OF THE CASE

On August 19, 1973, appellant Mark Oliphant, a non-Indian, was arrested by Suquamish Tribal Police on tribal trust land on the Port Madison Reservation for the offenses of assault and battery and resisting arrest. In August and September of 1973, a petition and a supplement to petition for writ of habeas corpus were filed in United States District Court for the Western District of Washington. The petitions challenged the authority of the Suquamish Indian Tribe to exercise criminal jurisdiction over Mark Oliphant.

On October 12, 1974, appellant Daniel Belgarde, a non-Indian, was arrested by Suquamish Tribal Police on fee patent land on the Port Madison Reservation for offenses of injury to public property and reckless endangerment. In December of 1974 the appellant Daniel Belgarde filed a petition for writ of habeas corpus in the United States District Court for the Western District of Washington. His petition also challenged the authority of the Suquamish Indian Tribe to exercise criminal jurisdiction over his person.

The Federal District Court upheld the exercise of criminal jurisdiction by the Suquamish in both cases. The Ninth Circuit Court of Appeals affirmed the holding of the District Court in *Oliphant* v. *Suquamish Indian Tribe* (Appendix, hereinafter A. 55), with Judge Kennedy in dissent. (A. 65).

While the actual exercise of criminal jurisdiction by Kitsap County on the Port Madison Reservation is not determinative of the legal issues raised in this appeal, the law follows reason and experience. In his *Oliphant* opinion, Judge Duniway places great reliance on appellee Suquamish Tribe's inaccurate description of the law enforcement situation on the Port Madison Reservation. Suquamish would have this court believe that it is the Suquamish who have brought law and order to the Port Madison Reservation.

Since criminal penalties are frequently used to support the regulation of business and domestic life through taxation and land use regulation, these cases present issues broader than the maintenance of peace on the Port Madison Reservation. Therefore, Kitsap County is providing this court with a complete picture of the Port Madison Reservation and the breadth of

jurisdiction asserted by 50 Suquamish Indians over approximately 3,000 non-Indian residents of a fee patent reservation. (A. 45, 47).

On July 19, 1977, the Suquamish Tribe held a public hearing as a preliminary step to adoption of an interim land development ordinance.[1] The ordinance makes it unlawful for any person to build any structure upon lands within the boundries of the Port Madison Reservation or to subdivide, plat, or otherwise modify existing land use within the same area for 18 months. It is also unlawful under the ordinance to clear or otherwise modify land located within the Port Madison Reservation for 18 months. The tribal council retains authority to vary the ordinance and allow building on the reservation consistent with the principles of a presently non-existent long range plan.[2] The ordinance makes it a criminal violation for any person to violate the provisions of the ordinance and the penalty for such a violation is $500.00 or six months in jail or both.

The non-Indian residents of the reservation have asked the tribe not to apply its resolution to non-Indian owned land.[3] The residents of the reservation have expressed a concern that the tribe is initiating actions to take over the use of their property, and all public functions such as taxation, schools, roads, water and sewer services on the reservation.[4] The Tribal Chairman, Richard Belmont, in response to those expressed concerns, indicated that the tribe would not be living

[1] Bremerton Sun, July 20, 1977

[2] *Id.*

[3] *Id.*, August 8, 1977.

[4] Seattle Times, July 30, 1977

up to its responsibility if it adopted a land use plan and did not perform all the functions a local government is supposed to perform.[5] The reservation non-Indians are clearly concerned that if total tribal control comes about, they will be subject to taxation without representation.[6]

The status of the land, people, and law enforcement on the Port Madison Reservation do not support the extension of tribal criminal jurisdiction in this case.

The Land.

By the Point Elliot Treaty of 1855 the Suquamish Indians were given 1,280 acres of land near Port Madison, Washington. (R. 54-56) (All references are to the Oliphant record unless otherwise specified). The Secretary of Interior increased the size of this reservation to approximately 7,300 acres in 1864. (R. 53, Map No. 2; R. 54, Exh. 2, 3). However, by 1905, pursuant to certain provisions of the Point Elliot Treaty, the General Allotment Act of 1887, 24 Stat. 388, and a special cession agreement enacted in 1905, 33 Stat. 1048, all but approximately 49 acres of the Port Madison Reservation were either allotted to individual Indians or otherwise disposed of. (R. 54, Ex. 4). The precise effect of these acts on the status of the Port Madison Reservation has been the subject of dispute and confusion for decades. Cf. *DeCoteau* v. *District County Court,* 420 U.S. 425 (1975); *Rosebud Sioux Tribe* v. *Kneip,* 45 U.S.L.W. 4346 (1976). See the discussion of the jurisdictional history of Kitsap County, *supra.* By 1971 there remained only 41 acres of tribal land and approximately 2,600 acres of land owned by in-

[5] Seattle Times, July 30, 1977

[6] Bremerton Sun, August 3, 1977

dividual Indians under a restricted fee. (R. 53, Map No. 4) The remaining 4,600 acres of land was held in unrestricted fee by non-Indians. (R. 53, Map No. 4)

Aside from one area of Indian ownership, the northeastern portion of the reservation was entirely owned by non-Indians who held unrestricted fee patents. (R. 53, Map No. 5) There is no tribally owned land in that portion of the reservation. The town of Indianola is contained wholly within the northeastern portion of the reservation. There is no Indian owned land in the unincorporated town of Indianola. The predominant land use in the northeastern portion of the reservation is rural. Some of the land in Indianalo has been zoned semi-rural.[7]

In the southwestern portion of the reservation the pattern of ownership may be described as checkerboard. Most of the land in the unincorporated town of Suquamish is owned by non-Indians. (R. 53, Map No. 5) The predominant land use in this portion of the reservation is rural. There is also intermediate and urban use[8] of the land in or near the town of Suquamish, including a school, small businesses, homes and undeveloped land.

As of 1971, approximately 63 percent of the land area of the Port Madison Reservation was held in nontrust or unrestricted fee patent. Approximately 36 percent of the total land area of the Port Madison Reservation is held by individual Indians in restricted fee status. Less than one percent of the total land area of the reservation is held by the tribe. (R. 53, Map No. 4)

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[7] Kitsap County Policy Plan Map, 1977

[8] Kitsap County Policy Plan Map, 1977

The People.

While an elderly member of the Suquamish claims that only 50 members of the tribe actually live on the reservation and only 22 are eligible voters in tribal affairs, (A. 46) a 1973 Bureau of Indian Affairs Census indicates that 173 Suquamish Indians live on the Port Madison Reservation.[9] Despite the presence of an additional 227 Klallam Indians on the Port Gamble Reservation in northern Kitsap County, only 2.6 percent of the 14,000 people of northern Kitsap County are Indian.[10] Projected growth estimates reveal that by 1985 there will be approximately 20,000 people living in northern Kitsap County.[11] The total population of Kitsap County is approximately 116,000.[12]

Nearly all retail and service outlets located on the reservation are owned and operated by non-Indians. However, they provide services to Indian and non-Indian alike. There are approximately 42 Indian dwellings located on the Port Madison Reservation. Many of these homes are located on non-Indian land.[13] The Indian population is widely disbursed throughout the reservation. The few who live on the reservation share public facilities, churches and schools with non-Indians who live on the reservation. (A. 40, 46) The majority of tribally owned land has been leased to non-Indian parties who reside on that land and pay State

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[9] Port Madison Comprehensive Plan, Sec. 1, Existing Conditions, 1974.

[10] Washington State Board of Education, 1974; Trident Fiscal Impact Analysis, June 1977.

[11] *Id.*

[12] *Id.*

[13] Port Madison Comprehensive Plan, Sec. 1, Existing Conditions, 1974.

taxes for the homes they put on that land. (A. 29) See, *Chief Seattle Properties* v. *Kitsap County*, 86 Wn.2d 7, 541 P.2d 699 (1975).

Most job opportunities for Indian and non-Indian residents of the Port Madison Reservation are and have been located off the reservation. The tribal chairman and both judges of the Suquamish are employed off the reservation by non-Indian employers. Tribal income is limited to law enforcement grants, the profits of a small smoke shop, and an annual income from non-Indian property owners who have built homes on 36 acres of tribal trust land.[14]

The predominantly non-Indian community of Suquamish has organized into two principle organizations: The Suquamish Community Club and Suquamish Emergency Services. The latter organization is made up of volunteer ambulance workers and volunteer firemen. The community club as of 1977 had 260 paid members. The members of these organizations work interchangeably on community affairs. The citizens of Suquamish financed and built a fire station and held rummage sales and auctions to pay $16,000 for a new ambulance and $16,000 toward expansion of the fire station. The residents of Suquamish have also financed and built a boat launching ramp and rebuilt part of the community dock. Other community activities include the support of a Senior Citizens Center, annual highway clean up, and the cutting and delivering of wood to Senior Citizens.[15] Until 1973, Chief Seattle Days was sponsored each year by the American Legion. (A. 46)

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[14] Port Madison Comprehensive Plan, Sec. 1, Existing Conditions, 1974.

[15] Letter from Suquamish Community Club, August 3, 1977, on file in Kitsap County Prosecutor's Office.

Kitsap County builds and maintains public roads located on the reservation. Public utility districts have been formed by the citizens of Indianola and Suquamish to provide water to the Indian and non-Indian residents of the Port Madison Reservation.[16] Kitsap County installed and owns the sewer system located on the Port Madison Reservation.

Kitsap County and the State of Washington provide residents of the Port Madison Reservation, non-Indian and Indian alike, with social, health, and educational services. There are no Indian Bureau physicians or nurses residing on the reservation. Private physicians are consulted by Indian and non-Indian alike.[17] Kitsap County also provides alcohol rehabilitation, drug abuse, and mental health counseling services.[18] Kitsap County is presently sponsoring construction of a day care facility for the residents of Kitsap County. The Kitsap County Community Action Program also administers programs and provides a variety of services to low income residents of Kitsap County.[19]

In the 1976-77 school year 3,334 students enrolled in the North Kitsap School District.[20] That school district consists of seven schools located in the North Kitsap

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[16] People and Kitsap, A Data Profile of Kitsap County, October, 1976 from Kitsap County Planning Department.

[17] Port Madison Comprehensive Plan, Sec. 1, Existing Conditions, 1974.

[18] People and Kitsap, A Data Profile in Kitsap County, *Ibid.*

[19] *Id.*

[20] Enrollment Records of the North Kitsap School District for 1976-77. There are no Indian schools on the Port Madison Reservation.

Peninsula. By 1985 it is projected that there will be approximately 4,700 students enrolled in the North Kitsap School District. In the 1976-77 school year only 35 Suquamish Indians attended schools in the North Kitsap School District. Suquamish Elementary School, which is the only school located on the Port Madison Reservation, has a 1976-77 enrollment of 184 students. Only 14 of these students are Indians.

Law Enforcement by Kitsap County.

In his majority opinion, Judge Duniway expresses the opinion that the events surrounding Chief Seattle Day showed the need for the exercise of jurisdiction by the Suquamish Tribe. As a matter of law, federal prosecution is available for major crimes under the Major Crimes Act, 18 USC 1153 (1970) and for all other incidents which would be violations of state law off the reservation, through the Assimilative Crimes Act, 18 USC 13 and 18 USC 1152. Either through the Assimilative Crimes Act or through authority conferred upon Kitsap County under Public Law 280, Mr. Oliphant would have been subject to state laws proscribing assault and disorderly conduct, among other charges.[21]

More importantly, it is inaccurate to characterize law enforcement for an entire year on the basis of an incident occurring on one weekend, during the only

[21] If state jurisdiction had been exercised, criminal charges could have been filed against Oliphant, including, Third Degree Assault, RCW 9.11.030; and Disorderly Conduct, RCW 9.87.010; and traffic code violations could have been charged against Belgarde, including: Reckless Driving, RCW 46.61.500; Negligent Driving, RCW 46.61.525; Speeding, RCW 46.61.400. These are all misdemeanors.

major gathering on the reservation for the year. The Kitsap County Sheriff's office does not serve as a private security force for large scale events such as rock concerts and Chief Seattle Days. Despite the large gathering in Suquamish only one arrest was necessary in breaking up one fight between two individuals. (R. 101)

In their return to the Belgarde petition for the writ of habeas corpus, the Suquamish inaccurately characterized an incident in which Mr. Belgarde was driving recklessly as another instance in which no law enforcement would have occurred if the Suquamish Police had not been present. (A. 103) The reports of the Suquamish Police from that incident, (A. 106-109) reveal that the initial contact with Mr. Belgarde occurred at 11:45 p.m. on October 11, 1974. There is no indication in the reports that there was any prior contact as alleged in the Suquamish briefs before the Federal District Court. (A. 94) Neither is there any identification that a report was made to the Kitsap County Sheriff's Office earlier in the evening. Even assuming that such a report was made, there is no indication in the officer's reports what kind of report would have been made, whether or not the nature of the report would have recommended action by the Kitsap County Sheriff's Office, or whether or not action was taken. Any doubt as to the intentions of Kitsap County in enforcing state and local laws on the reservation is resolved by what occurred later in the evening.

The Suquamish Police stopped the defendants, identified them, and arrested them. (A. 108) Once they were advised of the incident, both a Kitsap County Deputy Sheriff and a Washington State Patrol Trooper arrived at the scene to assist in the investigation of

the offense. Despite the fact that Trooper Broome apparently saw none of the defendant's driving activities and did not participate in his arrest, Trooper Broome assisted in the investigation and filled out an accident report concerning the matter.[22] The only reasonable inference that can be drawn from the events of October 11 and 12, 1974, during which the Suquamish Police saw a violation of the law and made an arrest, is that both the Kitsap County Sheriff's Officer and the Trooper from the Washington State Patrol actively assisted in the pursuit of the investigation of a crime occurring on the Port Madison Reservation.

The Kitsap County Sheriff's Office and Washington State Patrol enforce the laws of Kitsap County and the State of Washington on the Port Madison Reservation. The Washington State Patrol maintains in separate cars one to three officers at all times on state highways in North Kitsap County. State Highway 305 passes through the reservation. (R. 53, Map No. 7)

As of August of 1977, the Kitsap County Sheriff's Office employed 75 individuals, 48 of whom are duly commissioned law enforcement officers. Twenty-four hours a day and seven days a week there are usually two and at times one patrol car(s) on duty in Northern Kitsap County which car(s) patrol(s) the Port Madison Indian Reservation, among other areas in Northern Kitsap County. An additional patrol car is on the road as a traffic car which patrols problem areas in Northern, Central and Southern Kitsap County. Detectives of the Kitsap County Sheriff's Office assist in emergency situations and investigate felonies and

[22] In Washington a peace officer may not arrest another for a misdemeanor not committed in his presence. *Kilcup* v. *McManus*, 64 W.2d 771 (1964).

other matters occurring both on and off the Port Madison Indian Reservation. All officers and detectives of the Kitsap County Sheriff's Office are instructed to patrol the Port Madison Indian Reservation and investigate crimes occurring on fee patent land and highways on the reservation. They are also instructed to respond to all calls from non-Indian citizens living on the reservation. The Sheriff has spoken with non-Indian residents of the reservation and advised them to call him if they are dissatisfied with the service they receive from the Sheriff's Office.[23]

While statistics concerning law enforcement activities of the Kitsap County Sheriff on the Port Madison Reservation are not separately recorded, statistics for the entire County show the Sheriff's Office to be an effective law enforcement agency. The 1975 Kitsap County Regional Criminal Justice Plan reveals that the Sheriff's Office cleared offenses investigated by arrest at or better than the national average.[24] Comparisons in the same Criminal Justice Plan reveal that the Kitsap County Sheriff personnel are better trained than their counterparts on the reservation, the Suquamish Tribal Police.[25]

Criminal activity on the reservation is not a significant problem.[26] Most crime occurring in Kitsap County takes place in South or Central Kitsap County,

[23] Statement of Art Morken, Kitsap County Sheriff, February 24, 1977, June 25, 1975.

[24] 1975 Kitsap County Regional Justice Plan, Program Planning & Grant Administration, Bremerton, Washington, pages 145, 152, 157, 171.

[25] *Id.*, at pages 55, 60.

[26] See, Statement of Sheriff Art Morken, Bremerton Sun, July 3, 1975.

particularly in or near the two largest cities of Kitsap County, Bremerton and Port Orchard.[27] Kitsap County District Courts have jurisdiction over minor civil controversies and misdemeanors and gross misdemeanors for which the sentence imposed does not exceed one year or a $1,000.00 fine. Criminal offenses occurring on the Port Madison Reservation are filed either in District Court Two in Port Orchard which is 30 miles from the reservation, or, as is usually the case, in District Court Two-North in Poulsbo which is five miles from the reservation. All traffic offenses occurring on the reservation are filed in District Court Two-North.

Court records reveal that Kitsap County District Court Two-North is an active forum for the enforcement of criminal and traffic violations in the north end of Kitsap County. In 1976, 1,970 traffic cases were filed in that court and 209 criminal cases were filed in the same justice court.[28] Thirty-two civil matters were also heard during that time period. That court is available to and used by Indian and non-Indian alike.

While District Court Two in Kitsap County does not record statistics concerning criminal and traffic violations occurring on the Port Madison Reservation, this writer is personally familiar with cases arising on the reservation and prosecuted in District Court in Kitsap County. Indian and non-Indian alike respond to the criminal process of the state on this reservation.

In the *Oliphant* brief of the Suquamish before the Ninth Circuit Court of Appeals, the tribe has drawn general conclusions concerning the reluctance of County Prosecutors to prosecute non-Indians for minor offenses occurring on reservations. The Suquamish also relate that traffic offenses, hunting and fishing violations and other minor criminal offenses committed by non-Indians on Indian reservations go unpunished. Judge Duniway in his majority opinion in *Oliphant* apparently relies quite heavily on this characterization of law enforcement on the reservation. He quotes this entire section of the Suquamish brief at the end of the majority opinion. (A. 63-64)

[27] 1975 Kitsap County Regional Justice Plan, *supra* at page 100.

[28] These figures were obtained by adding the figures contained in the 12 monthly reports for 1976, submitted to the Court Administrator for the State of Washington.

These general conclusions do not apply to the Port Madison Reservation. In the Kitsap County Prosecutor's Office, the laws of the State of Washington and Kitsap County are enforced with very little plea bargaining. That policy has been favorably reviewed by a recent Washington State House of Representative's Judiciary Committee Staff Survey.[29] Where non-Indians commit crimes on the reservation, it is the policy of the Prosecutor's Office to prosecute such defendants. While statistics concerning Kitsap County's law enforcement activities on the reservation are not separately reported, this writer is personally familiar with incidents occurring on the reservation and prosecuted in District Court Two and District Court Two-North. The nature of charges filed in two recent incidents demonstrates that the Prosecutor's Office does not regard crimes occurring on the reservation as unworthy of its attention.

In *State of Washington* v. *Kris Espelund,* Cause No. C-1024N, filed in October of 1976, the defendant was charged with criminal trespass in the second degree, a misdemeanor punishable by a maximum fine of $500.00

[29] See, Report concerning this policy in October 25, 1976, Bremerton Sun.

and a maximum jail sentence of ninety days. The defendant and complaining witness had exchanged horses with each other. None of the parties involved were Indians. All of the parties resided on fee patent land on the Port Madison Reservation. The defendant became unhappy with the exchange and sought to recover her original horse. Since the defendant had to pass through two fences at the complaining witness' residence to obtain her original horse, and since she was not given permission to do so, she was charged with criminal trespass.

In *State of Washington* v. *Stanley Swearingen,* Cause No. C-5-16N, charges of disorderly conduct and resisting arrest were filed against the defendant in May of 1976. In that case all of the parties and property involved were non-Indian. The defendant, a resident of Suquamish, became intoxicated one evening and went to a party at another residence in Suquamish. The defendant became involved in a fight, blows were exchanged, and the Sheriff's Office was called. Contact by Sheriff's Officers at the scene of the incident resulted in additional charges of resisting arrest.

In a prosecution arising from an incident occurring prior to Kitsap County's entrance into this case as an amicus curiae, that is, in March and April of 1975, a non-Indian defendant made harrassing telephone calls to his non-Indian wife, who lived on her own property on the Port Madison Reservation. *State of Washington* v. *Leonard Asher,* C-4742. The complaining witness and defendant's ex-wife called both the Suquamish Tribal Police and the Kitsap County Sheriff's Office concerning these calls. Officers from both police forces initially responded to these calls. On subsequent occasions, the complaining witness' calls

were referred to the Kitsap County Sheriff's Office by the Tribal Police. At that time the Suquamish Tribal Police Officers indicated that it was their policy to refer complainants in cases not involving Indians and not involving Indian property to the Kitsap County Sheriff's Office. The defendant was charged with making harrassing phone calls pursuant to RCW 9.61.230, a misdemeanor. There is not an equivalent crime for making harrassing phone calls in the Suquamish Tribal Code.

State authority to regulate Indian and non-Indian hunting and fishing on and off Indian reservations is subject to numerous restrictions. See, *United States* v. *Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), aff'd. 520 F.2d 676 (9th Cir. 1075). Nevertheless, the Kitsap County Prosecutor's Office has been one of the most successful in the State of Washington in prosecuting such violations.[30]

Law Enforcement by the Suquamish Indian Tribe.

Prior to 1973, the Suquamish Indian Tribe had never adopted a Law and Order Code. A former chairman of the tribe recalls that since 1940 until the end of her chairmanship in the latter part of the 1960's there had never been any discussion by members of the tribe concerning passage of laws to control the conduct of any person on the Port Madison Indian Reservation. (A. 44) Prior to 1973, the Suquamish Tribe employed no tribal police and enforced no laws on the Port Madison Reservation.

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[30] See, letter from Acting Director of Department of Fisheries to Kitsap County Prosecuting Attorney, May 6, 1977, on file in the Kitsap County Prosecutor's Office.

Prior to the 1973 attempt by the tribe to exercise criminal jurisdiction over Petitioners, and prior to Public Law 280 in 1957, only Kitsap County, not the tribe or the federal government, exercised criminal jurisdiction over Indians and non-Indians alike on all public highways and on all fee patented lands throughout the Port Madison Reservation.

The Constitution and bylaws adopted by the Suquamish Tribe on July 2, 1965, under the Indian Reorganization Act of 1934, limited membership in the Suquamish Indian Tribe to persons of Suquamish Indian blood or their descendants. To serve on the tribal council or general council, to vote in any election, or to participate in tribal meetings, one must be a member of the Suquamish Tribe. (R. 54, Exh. 7).

The Suquamish Law and Order Code claims jurisdiction over all property and persons found within the historic boundaries of the Port Madison Reservation. However, to qualify to become a judge of the Suquamish Tribal Court or Court of Appeals, one must be a tribally recognized member of the Suquamish Tribe. The Law and Order Code does not purport to be a traffic code and does not provide for traffic offenses. It provides for numerous criminal and civil proceedings. However, Kitsap County Superior and District Courts fulfill most of these functions for residents of the Port Madison Indian Reservation. Since the code was enacted in 1973, the Suquamish Tribal Court of Appeals has never convened; no jury trial has ever been held by the Suquamish Tribal Court; the tribal court has consumated no marriages, ended no marriages, it has heard no adoption proceedings, no paternity or child support actions; it has heard no probate, estate or descent in

distribution matters.[31] By recent adoption of Resolution No. 76-065, the Suquamish Tribe amended the 1973 Law and Order Code to allow all Suquamish Tribal members, regardless of residence on or off the reservation, to serve as jurors in the Suquamish Tribal Court and to establish that only Suquamish Tribal members are eligible to serve as jurors in the same court. The Bureau of Indian Affairs' records reveal that in 1975 and 1976 no civil cases were filed in the Suquamish Tribal Court.[32]

The Suquamish Indian Tribe does not have jail facilities on the reservation. It contracts with municipalities for the use of their jail facilities. (A. 13) The tribe also lacks probation or parole facilities and does not currently employ probation or parole officers.[33] The tribe currently employs four police officers who share one police car.[33]

On July 1, 1975, non-Indian residents of the Port Madison Indian Reservation objected to the exercise of criminal jurisdiction by the Suquamish Tribal Police over non-Indians. As a result of that reaction, Tribal Chairman Richard Belmont indicated that he would let the Sheriff handle law enforcement on fee patent lands.[34] Bureau of Indian Affairs' reports indicate that in 1975 no criminal offenses were charged in

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[31] Interview with Grace Duggan, Chief Judge of the Suquamish Tribal Court, Cecelia Hawk, Associate Judge of the Suquamish Tribal Court, Natalie Rudolph, Suquamish Tribal Court Clerk on August 3, 1977.

[32] Annual Reports, Department of the Interior, Bureau of Indian Affairs, Portland Area, Port Madison Reservation, Western Washington Agency, 1975, 1976; Part IX of each annual report.

[33] Interview with Duggan, Hawk & Rudolph, note 31, *supra*.

[34] Kitsap County Herald, July 9, 1975.

the Suquamish Tribal Court.[35] The same report reveals that there were seven accidents investigated in 1975 and no offenses charged as a result of those accidents.[36] The Bureau of Indian Affairs' report of 1976 reveals that only Indians were charged with criminal offenses under the Suquamish Tribal Law and Order Code.[37] The same sources indicate that there was a total of 132 offenses committed in 1976, none involving an arrest for driving while under the influence or other traffic offenses.[38]

SUMMARY OF ARGUMENT

American Indian Tribes are political entities which have always exercised a personal form of sovereignty. Memo. Sol. I.D., April 27, 1939. Therefore, we must beware of reading into the measure of this jurisdiction the common law principle of the territoriality of criminal law. *Id.* If Indian self-government is expanded beyond the personal form of sovereignty to a territoriality, then it must inevitably yield to the sovereign of the soil. *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543.

To the extent that any greater rights have been recognized, they exist at the license of Congress. *See,* Martone, 51 Notre Dame Lawyer 600. States retain sovereign powers over their territory, and reservations are considered to be parts of the surrounding state in which they are located except as forbidden by federal law. *Kake Village* v. *Egan,* 369 U.S. 60, 72.

Congressional policy making through Indian treaties, the Trade and Intercourse Acts, the Major Crimes

[35] Department of Interior Report, *supra,* note 32, Part VI.

[36] *Id.* at Part VII.

[37] *Id.* at Part IV.

[38] Department of Interior Report, *infra,* note 32, Part IV, VA.

Act, the Indian Reorganization Act, Public Law 280, and the Indian Civil Rights Act has always been consistent with the limitation of tribal powers of self-government to jurisdiction over Indians. The mere use of the treaty power did not confer upon the tribes the status of international sovereigns. Cayuga Indian Claims Case, Nielson Report, 203, 307. While early in our constitutional scheme some Indian tribes were granted powers over non-Indians, the prevailing policy at all times in the nineteenth century was to not allow jurisdiction to Indian tribes over non-Indians. 7 Opinion Attorney General 174, 179. The guarantee of the exclusive use of lands made to Indians, conferred no general governmental powers which reach non-Indians. *Kake* v. *Egan, supra.*

Throughout the history of the Trade and Intercourse Acts Congress consistently denied jurisdiction to Indians over non-Indians. *Ex Parte Mayfield,* 141 U.S. 107. See, Clinton, 18 Ariz. Law. Rev. 503, 526-527. The grandest attempt to confer such jurisdiction to tribes over non-Indians, the Western Territory Bill, was defeated for the very reason that it created concurrent jurisdiction. Register of Debates, Volume 10, Part 4, 23rd Cong., 1st Sess., page 4771. The Interior Department maintained a consistent policy of denying tribes jurisdiction in criminal matters over non-Indians. 77 I.D. 113, 115.

Congress even chose to intrude into traditionally intratribal matters by passing the Major Crimes Act in 1885. While that act did not allow jurisdiction in Indian tribes over non-Indians, nonetheless, Congress and the court have excluded tribal jurisdiction. *Sam* v. *United States,* 385 F.2d 213, 214 (10th Cir., 1967).

The Indian Reorganization Act was intended to stabilize tribal organizations, not to confirm self-government on the basis of inherent sovereign rights. Schaab, 8 Nat. Res. Jl. 303, 309-312. With the incorporation of American Indians into our political system as citizens, Act of June 2, 1924, 43 Stat. 253, the Indian Reorganization Act can be seen as a logical step toward fuller participation for Indians in our constitutional framework. Tribal institutions which were bolstered by the Reorganization Act have for all practical purposes become arms of the federal government. *Colliflower* v. *Garland,* 342 F.2d 369 (9th Cir., 1965); *U.S.* v. *Wheeler,* 545 F.2d 1255 (1976). The passage of Public Law 280 is also consistent with this traditional limitation of tribal powers of self-government to jurisdiction over Indians. The act clearly did not confer additional powers upon the tribes. It removed federal jurisdiction to allow the reimposition of state jurisdiction over Indians and Indian lands. *Anderson* v. *Gladden,* 188 F.Supp. 666, aff'd 293 F.2d 463 (9th Cir., 1961), cert. den. 368 U.S. 949 (1961). If there remained any vestige of territorial power in tribes over non-Indians, Public Law 280 denied that jurisdiction to them. *U.S.* v. *Burland,* 441 F.2d 1199, 1202 (1971).

Even with the passage of the Indian Civil Rights Act, which guaranteed certain rights to Indian and non-Indian alike, Congress understood that tribal courts lack jurisdiction over non-Indians. 114 Cong. Rec. 9552-53; 113 Cong. Rec. 11473.

The very values most persuasive toward maintaining tribal self-government make inappropriate the extension of tribal governmental jurisdiction to non-Indians.

ARGUMENT

I.

AMERICAN INDIAN TRIBES ARE POLITICAL ENTITIES WITH LIMITED POWERS OF SELF-GOVERNMENT WHICH DO NOT INCLUDE JURISDICTION OVER NON-INDIANS. STATES RETAIN SOVEREIGN POWER OVER INDIAN RESERVATIONS EXCEPT TO THE EXTENT CONGRESS PREEMPTS THE EXERCISE OF THAT SOVEREIGN POWER

Underlying the abstract legal claim of jurisdiction by Indian and non-Indian political entities is a fundamental conflict. All citizens of the United States are guaranteed a republican form of government, Article 4, Section 4 of the United States Constitution, resting upon the consent of the governed and operating through representative institutions. See, Corwin, *Understanding the Constitution,* 4th Edition, 1967, 94-95. The exercise of tribal governmental power over non-Indians, if allowed to take place, would be a clear exception to that principle. It is inappropriate for Indian tribes to exert general governmental power over resident non-Indians who plainly would be entitled to vote and participate in tribal government but for the accident of their race. But, of course, it would frustrate the whole purpose of allowing Indian self-government to require them to allow non-members also to participate in their self-government. Once participation has opened up beyond the Indian people themselves, their governmental unit has abandoned its very purpose for existing—to allow Indians to make their own laws and be governed by them. Once political participation is extended beyond Indians themselves, there is literally no reason for having Indian government separate from political subdivisions of the state. See, American Indian Policy

Review Commission, Minority Report of Congressman Lloyd Meeds, 1977.

Similarly, it would further frustrate Indian self-government if Indian courts were required to conform closely to the substantive and procedural safeguards of state and local courts. To keep tribal courts essentially Indian in character, tribal values must be weighed against Anglo-American ideas of individual rights."[39]

Non-Indian courts have complex procedural systems designed to show correct and fair decision-making with appellate review to assure uniformity in decision-making and minimize the possibility of bias or error in individual cases. However, Indian tribal courts have very few of these complex assurances of fairness and accuracy in decision making. Few tribal judges are trained in the law of the states and of the United States, and few tribes have systems of appellate review.

The very values most persuasive toward maintaining tribal self-government make inappropriate the extension of tribal governmental jurisdiction to non-Indians. Indian tribal courts are created to regulate Indian affairs among the Indians themselves.

The solicitor for the Interior Department considered the nature of this power of self-government in an administrative ruling concerning the powers of an Indian court over the acts of Indians on unrestricted lands within an Indian reservation. In that opinion it was observed:

[39] See, Equal Protection under the Indian Civil Rights Act, 90 Harv. L. Rev. 627 (1977).

> If, on the other hand, the Indian courts are viewed as tribal courts, deriving their power from the unextinguished fragments of tribal sovereignty, it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons. We must therefore beware of reading into the measure of this jurisdiction the common law principle of the territoriality of criminal law. Memo. Sol. I.D., April 27, 1939, as reported in Cohen, Federal Indian Law, 1942, at 360.

This view of Indian self-government is consistent with the holding of federal courts that Indian courts may not exercise jurisdiction over non-Indians. *Ex parte Kenyon,* 14 Fed. Cas. 353 (No. 7720 W.D., Ark. 1878); Accord, *Ex Parte Morgan,* 20 Fed. 298 (W.D. Ark. 1883). American Indian policy observed this distinction throughout the nineteenth century. In *Ex parte Mayfield,* 141 U.S. 107 (1891), the Supreme Court of the United States reviewed certain criminal statutes and treaty provisions to conclude:

> The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversy between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side. 141 U.S. 117.

A. Indian Tribes Are Not Foreign States: Indian Reservations Located Within the Territorial Limits of States Are Considered Within The Jurisdictional Limits of The States.

When first confronted with the issue of the nature of Indian title, the Supreme Court of the United

States held that reservations were held for the use of Indians, but title to those lands was paramount in the state. *Fletcher* v. *Peck,* 10 U.S. (6th Cranch) (1810). In *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), Justice Marshall observed that the Indians were the rightful occupants of the soil with a legal and just claim to retain possession of it; however, he further observed that:

> Their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. *Id.* at 574.

Justice Marshall went on to hold that Indian tribes lacked the power to transfer absolute title to others. This is still the holding of the United States Supreme Court. See, *Tee Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955).

In *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831), a Cherokee tribe sought to restrain the state from applying its laws in Cherokee lands. The tribe attempted to interpose the treaty with the United States to avoid the application of state law to the Cherokees. *Id.* at 15. Chief Justice Marshall began by looking at the jurisdiction of the Supreme Court under Article 3 of the Constitution to find that unless the Cherokees were a foreign state under that article, the Court had no jurisdiction to hear the suit. He concluded that the Indian territory is a part of the United States considered within the jurisdictional limits of the United States. *Id.* at 20. He then observed that the Indians occupied a territory to which the United States asserted a title independent of their will and

that an Indian tribe is not a foreign state under the constitution. *Id.*

Chief Justice Marshall then observed in dicta that the Indian tribes of 1831 who lived within the acknowledged boundaries of the United States are not foreign nations; however, ". . . they may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to its guardian." *Id.*

Justice Baldwin observed in his concurring opinion: ". . . judicial power cannot divest the state's rights of sovereignty, and transfer them to Indians, by decreeing them to be a nation, or foreign state, preexisting and with rightful jurisdiction and sovereignty over the territory they occupy." *Id.* at 49.

In his concurring opinion, Justice Johnson observed that the sovereign rights of the Indian tribes were taken by Great Britain upon the first taking of possession of the Indian country and their sovereignty had since never been recognized as in them, otherwise then as dependent upon the will of the superior. *Id.* at 26. Justice Johnson went on to compare the condition of the Indians as Israelites:

> Their condition is something like that of the Israelites when inhabiting the deserts. Though without land they can call theirs in the sense of property, their right to personal self-government has never been taken away from them; and such a form of government may exist though the land

> occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them. *Id.* at 27.

The *Johnson* and *Cherokee Nation* opinions stand for the proposition that Indian tribes are not foreign states and whatever sovereignty they originally maintained was necessarily diminished; the United States took exclusive title to the lands occupied by Indians. These propositions are inconsistent with the retention of an inherent sovereignty which would extend general governmental powers over non-Indian residents of an Indian reservation.

The slender reed upon which the Suquamish rest their claim of inherent independent sovereignty is Chief Justice Marshall's opinion in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832). A non-Indian missionary was convicted of violating a Georgia statute which regulated who could live in Indian country. Chief Justice Marshall stated that power, war, and conquest give rights which after possession are conceded by the world. He noted that prior to the Revolution, the King of England had never intruded in internal affairs of the Cherokees, "or interfered with their self-government, so far as respected themselves only." *Id.* at 547. The Chief Justice then reviewed the treaty of Holston which he found to still be in effect and concluded that that treaty explicitly recognized the national character and right of self-government of the Cherokees. *Id.* at 556. It was in this context that he went on to point out that the Cherokee nation was a distinct community, occupying its own territroy, with boundaries in which the laws of Georgia could have no force.

Chief Justice Marshall's broad dictum on Indian sovereignty was a response to a state's attempted invasion of tribal privileges as express federal sanction. The term sovereignty is frequently a veil used where the issue is one of federal preemption of regulation in the field of Indian affairs. See, Martone, American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License? 51 Notre Dame Lawyer 600, 627-631 (1976).

In his concurring opinion Justice McLean agreed with the Chief Justice that Georgia could not extend its jurisdiction in that case. Justice McLean observed that the residence of Indians, governed by their own laws, within the limits of a state, has never been deemed incompatible with state sovereignty until recently. The reason it is not incompatible, he pointed out, is that sovereign powers were expressly conferred upon the federal government to regulate intercourse with the Indians. *Id.* at 592. He further observed that Indian tribes might become so degraded or reduced in numbers as to lose the power of self-government. At that point the exercise of state power would be proper. He concluded:

> So long as treaties and laws remain in full force, and apply to Indian nations, exercising the right of self-government within the limits of the state, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional. So long as federal power to regulate intercourse with the Indians is exercised, it cannot be obstructed by the state. *Id.*

Justice McLean's opinion foreshadows the modern tendency to look at the applicable treaties and statutes

to define the limits of state power, rather than to rely on platonic notions of Indian sovereignty. See, *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973).

Fourteen years later, the Supreme Court took a view different from that expressed by Justice Marshall in *Worcester*. In *United States* v. *Rogers*, 45 U.S. (4 How.) 566 (1846), a non-Indian adoptee of the Cherokee tribe had murdered another adoptee of the same tribe. In his opinion Chief Justice Taney pointed out that all Indian lands within the United States belong to the United States and not to the tribes, and that the land had only been assigned to them by the United States, "... as a place of domicile for the tribe (which) they hold and occupy ... with the assent of the United States, and under their authority." 45 U.S. at 571. The Chief Justice went on to observe that European governments had not acknowledged Indian tribes to be independent nations, but rather, had divided up the continent, "as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control." 45 U.S. at 571. Finally, he observed:

> We think it too firmly and clearly established to admit a dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the states, Congress may by law punish any offense committed therein, no matter whether the offender be a white man or Indian. 45. U.S. at 472.

The Supreme Court's treatment of ownership of Indian lands was consistent with Indian ideas of owner-

ship. The Indian's land could not be subjected to fixed personal ownership, purchase or sale, but rather was thought of in terms of family use, ownership or lineage use ownership. Land was not conceived of in terms of individual private ownership and exclusive possession because Indians decided to stress communal interests in sharing. Congress had expressed its awareness of the nature of Indian ideas of property when it considered the Removal Acts of 1830. H. Rep. No. 227, 21st Congress, First Sess., Ser. 200 at page 12. In House Report 227, at 7, it was observed that Indian tribes had no idea of a fixed property in lands before the partition of the country by the European nations. They did not have any conception that lands could be the subject of barter, until they were taught by the white man to so regard it. The Indians were a mobile people to whom the whole country was a common hunting ground for all Indians. Even when reservations were created within the boundaries of the provinces, before the Revolution, and the states, after it, the crown, proprietors of provinces, and states have all asserted the exclusive right, in themselves, to extinguish the title to lands reserved to the Indians, until the Constitution was adopted. *Id.* at page 6. After that time, the federal government has acted upon the same principle. *Id.*

B. States Retain Sovereign Power Over Indian Reservations Except to the Extent that Congress Acts to Prevent the Exercise of that Power

Indian tribes exert what has been characterized as merely a purposive, in contrast to general and territorial, tribal self-government. American Indian Policy Review Commission, Minority Report of Congressman Lloyd Meeds, 1977. Tribal self-government is limited to government of members of the tribe and does not

extend to non-members who reside within the reservation. If Indians had inherent sovereignty, they would be free from state law even in their dealings with non-Indians. Such is clearly not the case. In *United States* v. *McBratney,* 104 U.S. 621 (1881), the Supreme Court held that Colorado had jurisdiction over a non-Indian who killed a non-Indian on the reservation. Although a treaty between the United States and a tribe called for federal jurisdiction, the act of Congress admitting Colorado to the United States contained no such provision, and under the rule of the *Cherokee Tobacco,* 78 U.S. (11 Wall.) 616 (1870), the statute repealed the treaty.

The notion of sovereignty expressed in dicta in *Worcester* v. *Georgia,* has changed considerably, as has the condition of the tribes. In *Kake Village* v. *Egan,* 369 U.S. 60, 72 (1962), the Supreme Court traced this erosion. The general notion

> . . . that an Indian tribe is a distinct nation within whose boundaries state law cannot penetrate, has yielded on closer analysis when confronted with diverse concrete situations. By 1880, the court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of a surrounding state or territory except as forbidden by federal law. *Id.* at 72.

See, *Surplus Trading Company* v. *Cook,* 281 U.S. 647, 650-652 (1930).

The nature of state authority over Indian affairs was considered in *United States* v. *Kagama,* 118 U.S. 375, 379 (1886). There the court concluded that Indians are within the geographic limits of the United States and under the political control of either the government of the United States or of the states of the union since

there exists only two sovereign entities in the United States. The Court also concluded that the federal power over Indians must exist in federal government because it never existed anywhere else. But see *Anderson* v. *Gladden,* 188 F.Supp. 166, aff'd., 293 F.2d 463 (9th Cir. 1961) as to the constitutional basis for the federal power.

As early as 1832, Justice McLean had recognized the true nature of federal power in *Worcester* v. *Georgia.* There he concluded that so long as federal power to regulate intercourse with the Indians is exercised, it cannot be obstructed by the state. 31 U.S. 592.

The nature of the federal government's preemption in the area of Indian affairs was explored in *United States* v. *McGowan,* 302 U.S. 535 (1938). In *McGowan* the United States sought forfeiture of automobiles used to carry intoxicants into what the United States characterized as Indian country. The court found that the area in question was Indian country and that forfeiture was appropriate. The court went on to consider whether or not the federal prohibition against taking intoxicants into Indian county deprived the State of Nebraska of its sovereignty over the area in question. The court held:

> The federal government does not assert exclusive jurisdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.

More recent authority in the Supreme Court of the United States has focused its analysis of Indian cases

on this doctrine of federal preemption, rather than inherent Indian sovereignty:

> The trend has been away from the idea of inherent Indian sovereignty as a part of state jurisdiction and toward a reliance on federal preemption . . . the modern cases thus tend to avoid a reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973).

Recent authority also supports the characterization of Indian tribes as having only limited powers of self-government, rather than independent and inherent sovereignty. In *United States* v. *Mazurie,* 419 U.S. 554, 557 (1975), the court held that Congress has the power to regulate the sale of alcoholic beverages in Indian country and that Indian tribes are entities "... which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life..." such that Congress could constitutionally delegate its own authority to the tribe. The Court specifically set aside the question of whether or not the tribe's independent authority justifies imposition of an ordinance which would effect non-Indian conduct on non-Indian land within the reservation. *Id.*

It has been clearly held that state law applies to non-Indians on a reservation and the states may even require a tribe to implement state law as to non-Indians. *Moe* v. *The Confederated Salish and Kootenai Tribes of Flathead Reservation,* 96 S.Ct. 1634, 1645-46 (1976). This holding is certainly inconsistent with a belief that Indian tribes retain the status of "domestic dependent nations", as they were characterized by Justice Marshall in *Cherokee Nation* v. *Georgia, supra.*

Finally, there are constitutional objections to the subjection of non-Indians to tribal jurisdiction. In *Reid* v. *Covert,* 354 U.S. 1 (1957), the Supreme Court held that Congress may not under its power to make rules for the government and regulation of the land and naval forces subject civilians to criminal trial in military courts because such civilans are entitled to be tried in Article III Courts. Accord, *Kinsella* v. *U.S. ex rel. Singleton,* 361 U.S. 234 (1960); compare, *Callahan* v. *Parker,* 395 U.S. 258 (1969). There should be far less authority for Congress to allow criminal jurisdiction over non-Indians in non-Article III courts operating within the boundaries of states.

II.

CONGRESSIONAL POLICY MAKING THROUGH INDIAN TREATIES WAS CONSISTENT WITH THE LIMITATION OF TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

The mere use of treaty-making power does not in itself confer the status of international sovereign entity upon Indian tribes. See, Higgins, International Law Considerations of the American Indian Nations by the United States, 3 Ariz. L.Rev. 74, 79 (1961). International tribunals have denied American Indian tribes international status. Cayuga Indian Claims case (*Great Britain* v. *United States*), Nielson Report, 203, 307 (1936). Although doubtful provisions of treaties are usually construed in favor of Indians, treaties do not otherwise have an exalted status; they may be repealed by subsequent statutes. The *Cherokee Tobacco,* 78 U.S. (11 Wall.) 616 (1870).

In Argument I, page 15, 16, 18, *supra,* it was established that tribal powers were of a personal rather

than territorial and general governmental nature. The prevailing policy at the time of the Point Elliott Treaty was to not allow jurisdiction to Indian tribes over non-Indians. Most of the treaties between the United States and various Indian tribes entered into before 1800 did not allow jurisdiction over non-Indians by Indian tribes. See, Treaty with the Cherokees, 7 Stat. 18 (1785); Treaty with the Creeks, 7 Stat. 35 (1790). In a few of the earlier treaties, Congress had specifically provided for Indian jurisdiction over non-Indians, Treaty with the Cherokees, 7 Stat. 39 (1791). The few treaties that did grant such jurisdiction did so *expressly* and merely followed the practice accepted with respect to international treaties. Later treaties did not allow for tribal jurisdiction over non-Indians. Treaty with the Sacs and Foxes, 7 Stat. 84 (1804) (required the tribe to make complaint to the superintendent); Treaty with the Quapaws, 7 Stat. 176 (1818) (superintendent to punish white who injured Indians as if the injury had been done to a white man). The fairly standard clause on criminal jurisdiction in the 1820's can be found in the Treaty with the Soune and Qualla, 7 Stat. 252 (1825):

> . . . for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, complaints shall be made, by the injured party, to the superintendent or agent of Indian affairs . . . and it shall be the duty of said chiefs, upon the complaint being made as aforesaid, to deliver of the person or persons, against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States. And, in like manner, if any robbery, violence or murder, shall be committed on any Indian or Indians belonging to the said bands, the person or persons so offending shall be tried, and if found guilty shall be punished in like manner as if the injury had been done to a white man.

An opinion of the Attorney General of the United States, issued the same year in which the Treaty of Point Elliot was signed, describes negotiations which considered whether or not the Choctaws would have jurisdiction over non-Indians:

> The Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own laws any white man who shall come into the nation, and infringe any of their national regulations (Article 4). But Congress did not acceed to this request. On the contrary, it has made provision, by a series of laws, for the punishment of crimes affecting white men committed by or on them in the Indian country, including that of the Choctaws, by the courts of the United States. See Act of June 30, 1834, IV Statutes at Large, page 729, and Act of June 17, 1844, V Statutes at Large, page 680. These acts cover, so far as they go, all crimes except those committed by Indian against Indian. 7 Opinion Attorney General 174, 179 (1855).

The contemporary refusal to grant other Indian tribes this very power over non-Indians indicates that the federal government did not consider such power an inherent attribute of tribal sovereignty. Absence of such an empowering provision in the Treaty with the Suquamish raises a strong inference that Congress did not intend them to exercise such jurisdiction.

In its Ninth Circuit *Oliphant* Brief, the Suquamish point to Article 2 of the Treaty of Point Elliot which provides that white men are not to be permitted to reside upon the Port Madison Reservation without the permission of the tribe and of the superintendent or agent. The Suquamish conclude from this provision that the right to exclude necessarily imparts general

governmental powers to the Suquamish Indian Tribe over non-Indians. The power of exclusion does not impart such powers to the tribe. Although the treaty originally guaranteed the exclusive use of those lands to the Indians, this exclusivity is no longer a fact, due to events and subsequent acts of Congress. With respect to the remaining Indian lands, although the tribe is more than a mere private landowner, *United States* v. *Mazurie, supra,* mere ownership of lands does not give rise to governmental powers. See, American Indian Policy Review Commission, Minority Report of Congressman Lloyd Meeds, 1977. Governmental powers have as a source the State and Federal Constitutions. As has been earlier pointed out, but for the exercise of congressional power, Indian reservations are subject to the governmental power of the states in which they are located. *Kake* v. *Egan, supra,* In *Egan,* the distinction between proprietary and governmental interests was recognized. In *Egan* the Supreme Court held that provisions such as that in the Washington Constitution, which disclaim property interests and declare that Indian property shall be and remain under the absolute jurisdiction and control of the United States, disclaim only right and title of the state of proprietary rather than governmental interests.

Furthermore, the tribe only exercises the power to exclude to the extent that Congress has granted that power to the tribe. The tribal power to exclude non-Indians from reservations has been limited by the due process provisions of the Indian Civil Rights Act. 24 USC 1302 (8).

As early as 1817 Andrew Jackson had written to President Monroe concerning the absurdity of dealing with Indian Tribes through treaties: "I have long

viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government. The Indians are the subjects of the United States, inhabiting its territory and acknowledging, then it is not absurd for the sovereign to negotiate by treaty with the subject." Basset, Correspondence of Andrew Jackson as quoted in Higgins, American Indian Nations, *infra* at page 26.

By 1869 even the Commissioner for Indian Affairs, Ely S. Parker, himself a Seneca Indian, concluded that treaty making with Indians gave them a false impression of their constitutional status and that treaty making should be ended. See, Annual Report of Commissioner of Indian Affairs, December 23, 1869.

Whatever inference may have been raised with respect to tribal sovereignty by the use of a treaty power by the United States, it was negated by the action of Congress on March 3, 1871, at which time Congress proclaimed that: ". . . hereafter no Indian nation or tribe within the territory of United States shall be acknowledged as an independent nation, tribe or power with which the United States may contract by treaty . . ." 16 Stat. 566.

III.

THE LEGISLATIVE HISTORY OF THE TRADE AND INTERCOURSE ACTS IS CONSISTENT WITH THE LIMITATION OF TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

In *Ex Parte Mayfield,* 141 U.S. 107 (1891) the Supreme Court reviewed the Trade and Intercourse Act, 18 USC 1152, in its predecessor form:

> The policy of congress has evidently been to vest in the inhabitants of the Indian country such

> power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy, and to consture the acts of legislative authority in consonance therewith. The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.

The Trade and Intercourse Acts were first adopted in temporary form and renewed in 1790, 1793, 1796, 1799 and the first permanent enactment occurred in 1802. Act of July 22, 1790, 1 Stat. 137; Act of March 1, 1793, 1 Stat. 329; Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799, 1 Stat 743; Act of March 30, 1802, 2 Stat. 139. Each of the successive acts addressed non-Indian conduct in Indian country and controlled such conduct by placing jurisdiction for offenses committed under the respective acts in ". . . the Superior Courts in each of the said territorial districts, and the circuit courts, and other courts of the United States with similar jurisdiction in criminal causes . . ." 1 Stat. 331, 473, 747; 2 Stat. 144. Although trials under these acts were to be held in federal courts, some of the crimes were defined by state law. See, 1 Stat. 138 Sec. 5. The acts made further provision for forfeiture and penalties for taking property from Indian lands. 2 Stat. 141, Sec. 4.

In 1817 Congress expanded the reach of the Act beyond crimes by non-Indians against Indians to reach

crimes by any person within Indian territory which if committed under the sole and exclusive jurisdiction of the United States would be punished by the laws of the United States, ". . . provided that nothing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offense committed by one Indian against another, within any Indian boundary." Act of March 3, 1817, 3 Stat. 383. Section 2 of the 1817 Act vested jurisdiction over offenses in the Superior Courts of the territory and other courts of the United States with similar jurisdiction in criminal causes. *Id.*

One of the principal enforcement mechanisms for the Trade and Intercourse Acts consisted of military troops, not Indians. It was the military who apprehended persons who were in Indian country illegally, and the troops conveyed them immediately by the nearest convenient and safe route to the civil authority of United States and the adjoining state or territory to be tried. Prucha, American Indian Policy in the Formative Years, page 62 (1962).

These early versions of the Trade and Intercourse Acts established the pattern of federal jurisdiction over interracial crimes, that is, crimes involving non-Indians were tried exclusively by federal courts. Only intratribal matters were left to the Indians. See, Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 526-527. Allowing Indians jurisdiction only as to matters between tribal members is consistent with the notion of self-government described herein.

In 1832, Congress considered three bills intended to (1) reorganize the Indian Department, (2) establish a new Trade and Intercourse Act, and (3) organize a

Western Territory for the use of Indians who had migrated to the west. At the time these bills were considered, "it was the policy of the United States to isolate the tribes on territory of their own beyond the Mississippi, where they were quite free to govern themselves." *Kake, supra* at 71. This policy has been reversed, and Indians are now part of the nation. *Id.*, at 72. While the committees considering this legislation urged that the bills were part of a system and should be passed together, Congress refused to pass all three bills.

The first bill reorganized and economized the Indian Department, placing added responsibilities on the military officers on the frontier. Prucha, American Indian Policy in the Formative Years: The Trade and Intercourse Acts 1790-1834, at 259-261 (1962). None of its provisions provides support for the conclusion that Congress intended to allow tribes jurisdiction over non-Indians. The second bill defined Indian country, licensed traders therein and restricted and regulated non-Indian activities in Indian country. *Prucha, supra,* at 261-269.

No provision of the Trade and Intercourse Act demands or implies that tribes be allowed or granted jurisdiction over non-Indians. Section 25 (4 Stat. 729, 733), provided for the application to Indian country of laws applying in areas within the exclusive jurisdiction of the United States. One of these laws is the Assimilative Crimes Act, 18 USC Section 13. That act incorporates state criminal law into the federal criminal code, applies it to federal enclaves, and keeps a federal forum for the trial of such crimes.

Section 9 of the Western Territory Bill was intended to confer on tribes criminal jurisdiction over non-

Indians. H. Rep. No. 474, 23rd Cong., First Sess., June 20, 1834, pages 36 and 37. While the Commissioner of Indian Affairs West and the Commission on Indian Affairs supported the Western Territory Bill, it was ultimately rejected by Congress.

The Western Territory Bill established a voluntary confederation of tribes which it was hoped would send a delegate to Congress and eventually be admitted as states into the Union. Prucha, American Indian Policy, at 270, 272. The Western Territory Bill was severely criticized. John Quincy Adams assailed it, asking what constitutional right had the United States to form a constitution and formal government for Indians. Adams also pointed out that the admission of an exclusively Indian state to the Union was a seminal idea, and might set a dangerous precedent. The bill was introduced late in the session just prior to adjournment and Mr. Adams asked: "Was the house prepared . . . upon a half-hours notice totally to change the relations of the Indian tribes of this country?" See, Prucha, American Indian Policy at 270-273.

John Quincy Adams also understood the Western Territory Bill to establish a double jurisdiction, that is, jurisdiction by both tribal and federal courts over a person's activities. The existence of this double jurisdiction was one of the very reasons given for the ultimate rejection of the Western Territory Bill. Register of Debates, Volume 10, Part 4, 23rd Cong., First Sess., page 4771 (1834). The bill was also rejected because it left too much power in the President's hands and established a government solely for Indians. *Id.*

The potential for double jeopardy was further recognized by Congress in adopting the 1834 Act:

> In consequence of the change in our Indian relations, the law relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision. By the Act of 3rd March, 1817, the criminal laws of the United States were extended to all persons in the Indian country, without exception, and by that act, as well as that of 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of some of our treaties and of the Territorial Act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian Law in the early stages of their government. It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits.

Although the report is in error as to the effect of the laws of 1817, since crimes by any person were covered by that act, and only crimes between Indians were exempted, the above quotation reflects their concern over the constitutionality of their assertion of jurisdiction over Indians. *Worcester* v. *Georgia* had only been decided two years prior to this time. Despite Congress' fears of the unconstitutionality of its action, and because it did not trust Indian law in the early stages of government, congress took jurisdiction over crimes by and against Indians.

Except as amended in 1854, the 1834 Act remains the same today as it was in 1834.

In 1854 Congress' concern with double jurisdiction resulted in an amendment to Section 25 of the Trade and Intercourse Act. That amendment exempted from the provisions of Section 25 any Indian committing an offense in Indian country who had already been punished by the local law of the tribe. Act of March 27, 1854, 10 Stat. 269. The amendment was intended to extend double jeopardy protections only to Indians, and it was so stated in Congress. Congressional Globe, Volume 32, 33rd Congress, page 701 (March 21, 1854). There was no indication when the amendment was adopted that the Section applied to non-Indians, thereby raising the inference that non-Indians were not subject to the tribal jurisdiction asserted prior to the amendment of Section 25 of the 1834 Trade and Intercourse Act.

In 1834, the Attorney General of the United States similarly interpreted Section 25 of the 1834 Act as excluding criminal jurisdiction by tribes over non-Indians: 2 Opinion Attorney General, 693, 695:

> . . . the 25th Section of the Act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be enforced in Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person and property of another. Thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves.

In 1855, the Attorney General of the United States again arrived at the same conclusion. 7 Opinion Attorney General 174, 179 (1855).

Historically, the Department of Interior has taken the position that Indian tribal governments lack criminal jurisdiction over non-Indians.

In 1883, the Secretary of Interior issued regulations for courts of Indian offenses. At that time, and as recently as 1976, the Department of Interior has taken the position that the court of Indian offenses has jurisdiction only over offenses "committed by any Indian, within the reservation or reservations for which the court has been established." 55 I.D. 401-421 (1934); 25 CFR Section 11.2 (1976).

In 1939 the Interior Department took the position that tribal courts do not have jurisdiction over non-Indians. See, Administrative Ruling of Solicitor of Interior Department, April 27, 1939, as quoted in Cohen, Federal Indian Law (1942) at 359, 360-361.

As of August 10, 1970, the Department of Interior still took the position that Indian tribal government had no criminal jurisdiction powers over non-Indians. 77 I.D. 113, 115 (1970); cited with approval in 78 Id. 229, 230 (1970).[40] However, even though the *Kenyon* decision and the Attorney General opinion of 1855 suggest that Indian tribes do not have jurisdiction over Indians who commit offenses against non-Indians, in 1970 the Department of Interior took the position that the practice and interpretation of 18 USC Section 1152

[40] Although the opinion was withdrawn on January 25, 1974, an inconsistent position has not been published. A similar position was taken in the 1958 Edition of Federal Indian Law, at 451.

has been to recognize the jurisdiction of tribes over offenses by tribal members, at least against non-Indians. See, 77 I.D. at 114, n. 2.[41]

IV.

THE HISTORICAL APPLICATION OF THE MAJOR CRIMES ACT IS CONSISTENT WITH THE CONGRESSIONAL POLICY OF LIMITING TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

Congressional, judicial, and tribal treatment of the Major Crimes Act are consistent with the limitation of tribal powers of self-government to jurisdiction over Indians. The Trade and Intercourse Act does not apply to crimes committed between Indians. 18 USC Section 1152 (1970). The fact that the Trade and Intercourse Act excepts from the application of its provisions intratribal matters is further evidence of Congress' consistent policy of limiting tribal powers of self-government to jurisdiction over Indians. The Major Crimes Act, 18 USC Section 1153 (1970), precludes tribes from exercising criminal jurisdiction over major crimes. It is difficult to understand how Congress would preclude tribes from exercising jurisdic-

[41] A February 24, 1975, statement from Reid Peyton Chambers, Associate Solicitor of Indian Affairs, Department of Interior, was submitted into Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs of the United States Senate, on S. 2010. Indian Law Enforcement Improvement Act of 1975. Mr. Chambers stated: "The Department of Interior has withdrawn an earlier opinion of the solicitor holding that no tribes have any criminal jurisdiction over nonmembers. This subject is under ongoing review within the Department and will be carefully assessed as the law develops and becomes clear in this area. At the present time I do not believe that the Department is prepared to support tribal criminal jurisdiction over non-Indians on land within open portions of reservation." Page 633.

tion over major crimes committed by Indians, but allow tribes to exercise jurisdiction over non-Indians for the same major crimes.

In 1874 a predecessor of the Federal Major Crimes Act was rejected because it conflicted with the exercise of tribal jurisdiction:

> The Indians, while their tribal relations subsist, generally maintain laws, customs, and usages of their own for the punishment of offenses. They have no knowledge of the laws of the United States, and the attempt to enforce their own ordinances might bring them in direct conflict with existing statutes and subject them to prosecution for their violation. S. Rep. No. 367, 43rd Congress, First Session (1874), page 2, as quoted in *Cohen,* Federal Indian Law, (1942) at 147, n. 222.

In *Ex Parte Crow Dog,* 109 U.S. 556 (1883), the Supreme Court ordered the release of an Indian convicted in federal court of killing another Indian. The Supreme Court held that under the language of the treaty in question, the tribe was to retain exclusive power over punishment of criminal actions. In response to this ruling, Congress passed a bill to require that trials for certain specified major crimes take place in federal court.

Unlike the amended provisions of Section 25 of the 1834 Act, the Major Crimes Act did not immunize Indians who had already been tried and punished by tribal authorities from further prosecution by the United States over its territories. The Act implicitly repealed tribal jurisdiction over the serious offenses which it covered. See, *United States* v. *Cardish,* 145 Fed. 242 (1906) and *United States* v. *Whaley,* 37 Fed. 145 (1888). While an amendment was proposed to

allow tribal jurisdiction over intratribal offenses, see, Amendment of Congressman Budd, 16 Cong. Rec. 934 (1885), there was no debate on the proposed amendment. Discussion revolved primarily around the control of liquor on the reservations and appropriations for the purchase of Indian land. 16 Cong. Rec. 22 et seq.

Despite the prior legislative history, the extent of federal involvement in the area of criminal jurisdiction has preempted jurisdiction in the tribe over such crimes.[42] More recently, federal courts have found that the Major Crimes Act excludes tribal jurisdiction. *Sam* v. *United States,* 385 F.2d 213, 214 (10th Cir. 1967); see, *Felicia* v. *United States,* 495 F.2d 353, 354 (8th Cir.) cert. den. 419 U.S. 849 (1974).

The Interior Department has treated the Major Crimes Act as excluding tribal jurisdiction. 65 I.D. 14, 66. See, *Cohen,* Federal Indian Law (1942) at 449.

Furthermore, the 1968 Indian Civil Rights Act limited the jurisdiction of Indian courts by limiting penalties to imprisonment for a term of 6 months or a fine of $500.00. Public Law 90-284, 82 Stat. 77, 25 USC 1302.

As a matter of practice, Indian tribes have not asserted jurisdiction under the Major Crimes Act. Even a member of the law firm representing the Suquamish has admitted to Congress that he is aware of no at-

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[42] *Cohen,* Federal Indian Law (1942) at 449. By adopting the Major Crimes Act, "Congress intruded upon reservation self-government to extend federal criminal law over several specified crimes committed by an Indian against another on Indian land. Other offenses remain matters for the tribe." *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 72 (1962).

tempt by Indian tribes to prosecute major crimes. Hearings on S. 1400 Before Subcommittee on Criminal Laws and Procedures of Senate, Judiciary Committee, 93rd Cong., 1st Sess., Part VII, page 5894 (1973). On another occasion a member of the same law firm has declared that he is unaware of any tribe which is interested in enforcing the Major Crimes Act. That same individual indicated that the expense is inappropriate and the federal government or state can do a better job on those kinds of cases. Hearings on the Indian Law Enforcement Improvement Act of 1975, Before Subcommittee on Indian Affairs of Senate Committee on Interior and Insular Affairs, 94th Cong., 1st Sess., page 118.[43,44]

V.

PASSAGE OF THE INDIAN REORGANIZATION ACT OF 1934 WAS CONSISTENT WITH THE CONGRESSIONAL POLICY OF LIMITING TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

With the incorporation of Indians into our political system as citizens, Act of June 2, 1924, 43 Stat. 253, the Indian Reorganization Act was a logical step to bring fuller participation to Indians in our constitutional scheme. If Indians were not part of the sov-

[43] Since tribal courts are arms of the federal government, for purposes of double jeopardy, prosecution in tribal court is precluded once the federal government has acted. *United States* v. *Wheeler*, 545 F.2d 1255 (1976); see, *Colliflower* v. *Garland*, 342 F.2d 369 (9th Cir. 1965).

[44] The legislative history behind 18 USC 1165, a statute prohibiting trespass on Indian land for hunting or fishing, reveals Congress' belief in 1960 that tribes lacked jurisdiction over non-Indians. See, S. Rep. No. 1686, 86th Cong., 2nd Sess. 2-3 (1960) and discussion in Judge Kennedy's dissent in *Oliphant* (A. 72-73).

ereign prior to 1924, they most certainly became part of the sovereignty by that act of citizenship. Johnson, Sovereignty, Citizenship and the Indian, 15 Ariz. L. Rev. 973, 996-7 (1973). No extra constitutional source of sovereign powers for Indian self-government could be admitted once Indians became citizens.

The Indian Reorganization Act was not intended to recognize or confirm self-government by Indian tribes on the basis of inherent sovereign rights. See, Schaab, Indian Industrial Development and the Courts, 8 Nat. Res. Jl. 303, 309-312. It was intended to stabilize tribal organizations and to allow them the use of modern business organizations. *Id.*, citing language of Senate Committee Report. The entire discussion of the Indian Reorganization Act in both houses took place in terms of granting new rights to Indian tribes. See, for example, Statements of Senator Wheeler, 78 Cong. Rec. 11124 (1934); Statement of Senator Ayers, 78 Cong. Rec. 12164 (1934). By accepting the Act, individual tribes could exercise limited rights of self-government under a tribal constitution approved by the secretary. 25 USC Section 476 (1970) The Suquamish adopted their tribal constitution under the Act. (R. 54, Exh. 7) Certain regulations of the Department of Interior apply to and limit the power of tribal governments constituted under the Indian Reorganization Act.[45] Tribal government organized under the acts is a creation of Congress. It derives its power from congress and can exercise only such powers as Congress has provided. See, *Schaab, supra* at 310-311, n. 28.

Tribal courts are for all practical purposes arms of the federal government. In *Colliflower* v. *Gar-*

[45] See, 25 C.F.R. Sec. 11.1(d) (1976).

land, 342 F.2d 369 (9th Cir., 1965), the Ninth Circuit held that Federal District Courts had the jurisdiction to issue writs of habeas corpus to determine the validity of tribal court decisions. The court reviewed the history of tribal courts, including the passage of the Indian Reorganization Act of 1934. While the court limited its holding to the court before it, a court of Indian offenses, there is little qualitative difference between the functions of courts of Indian offenses and tribal courts. See, DeRaismes, 20 S.D. L. Rev. 59, 71 n. 45. See, *Settler* v. *Yakima Tribal Court,* 419 F.2d 486 (9th Cir. 1969). In a more recent case, *United States* v. *Wheeler,* 545 F.2d 1255 (9th Cir., 1976), the same court considered whether tribal and federal courts could both prosecute an individual for the same activities. The *Wheeler* case involved a tribal court, not a Court of Indian Offenses. Nevertheless, the Ninth Circuit held that tribal courts are arms of the federal government for purposes of doouble jeopardy, and prosecutions for the same offense cannot be allowed in both the tribal court and federal court. 545 F.2d 1258.

VI.

THE PASSAGE OF PUBLIC LAW 280 IS CONSISTENT WITH THE LIMITATION OF TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

By enacting Public Law 280, the federal government authorized states to assume criminal jurisdiction exclusive of Indian tribal jurisdiction. Act of August 15, 1953, 67 Stat. 588, partially codified in 18 USC Section 1162 (1970), 28 USC Section 1360 (1970). The legislative history of Public Law 280 does not plainly state whether that act was intended to confer jurisdiction

over non-Indians on to states. To the extent that Public Law 280 addresses only the imposition of jurisdiction over Indians by state government, it is further evidence that tribes had never been given jurisdiction over non-Indians. To the extent that tribes had been allowed some jurisdiction over non-Indians in the past, see, 77 I.D. 113, 114, n. 2, and to the extent that Public Law 280 confers jurisdiction over Indian and non-Indian alike to the exclusion of tribal courts, it is further evidence of the lack of jurisdiction in tribal courts over non-Indians. Finally, to the extent that Federal jurisdiction has preempted the exercise of State jurisdiction over non-Indians, removal of that federal jurisdiction reimposes State jurisdiction over Indian and non-Indian alike, regardless of the existence or non-existence of an enabling provision. See, *Anderson* v. *Gladden,* 188 F.Supp. 666, aff'd., 293 F.2d 463 (9th Cir., 1961), c.d. 368 U.S. 949 (1961) and *Anderson* v. *Britton,* 212 Or. 1, 318 P.2d 291 (Ore. Sup. Ct. 1957).

The legislative history reveals that at a minimum Public Law 280 was designed to cure law enforcement problems occurring among Indians in Indian country:

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many states, tribes are not adequately organized to perform that function; consequently, there has been a hiatus in law enforcement authority that could best be remedied by conferring criminal jurisdiction on states indicating an ability or willingness to accept such responsibility. House Report No. 848, 1953 U.S. Code, Cong. Adm. News. 2411-2412.

As recently as 1975, an assistant solicitor for the Department of Interior has indicated that in his opinion Public Law 280 did not affect tribal jurisdiction over non-Indians. See, Statement of Mr. Chambers, Hearings on 1975 Indian Law Enforcement Improvement Act, *infra* at page 64.

A. Public Law 280 Authorized The State of Washington To Assume Criminal Jurisdiction, Exclusive Of Indian Tribal Jurisdiction, Over The Port Madison Reservation.

In *U.S.* v. *Burland,* 441 F.2d 1199, 1202 (1971), the court concluded that Public Law 280 was intended to substitute state for federal jurisdiction on a geographic and subject matter basis rather than in terms of persons. There is support in the legislation's language and history for that conclusion. *Id.* at 1202.

The State of Washington assumed jurisdiction over Indians in Indian reservations through Section 6 of Public Law 280. *Quinalt Tribe of Indians* v. *Gallagher,* 368 F.2d 648 (9th Cir., 1966). Public Law 280 gave the consent of the United States to States such as Washington ". . . to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this act . . ." 67 Stat. 588.

Section 7 of Public Law 280 gave the consent of the United States to other States ". . . not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction . . . by affirmative legislative action . . ." 67 Stat. 588.

The purpose behind enacting Sections 6 and 7 was to allow states with laws expressly disclaiming jurisdictions to amend those laws to obtain jurisdiction by subsequent enactment. The language of Sections 6 and 7, which authorized optional assumption of jurisdiction, speaks in terms of the United States consenting to a state's acceptance of civil and criminal jurisdiction "in accordance with the provisions of this Act" (Section 6) and "as provided for in this act" (Section 7). This language suggests that optional states were to assume as much jurisdiction as the mandatory states. See, Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 548 (1975). Clinton, Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Arizona L. Rev. 503 (1976).

Mandatory states obtain jurisdiction over Indians and Indian reservations through Section 2(a) of Public Law 280, codified as 18 USC Section 1162(a). Section 2(a) gives jurisdiction to States over offenses committed by or against Indians in Indian country ". . . to the same extent that such state . . . has jurisdiction over offenses committed elsewhere within the state . . ." There is no indication in the legislative history that states assuming jurisdiction under Section 6 and 7 were to receive any less jurisdiction than those receiving it under Section 2(a), therefore the provisions and subsequent history of Section 2(a) is relevant to resolve issues involving Section 6 and 7. Furthermore, statutory provisions which are part of the same act are regarded in pari materia and should be construed in their entirety. 73 Am.Jur.2d Statutes, Sections 187-191.

Section 2(c), 18 USC 1162(c) provides that the Trade and Intercourse Act, 18 USC Section 1152 and the Major Crimes Act, 18 USC Section 1153, shall not apply in the mandatory states. The clear implication

of the language of Section 6 and 7 is that the jurisdictional opportunities afforded discretionary states be the same exclusive state jurisdictional structure provided for the mandatory states.[46] Section 1321 appears to afford the same opportunities to states, now only with tribal consent, to assume complete criminal jurisdiction over Indian lands exclusive of federal jurisdiction under Section 1152 and 1153.

Further evidence of Congress' intent to grant state jurisdiction exclusive of the Indian tribes can be found in 1970 amendments to 18 USC Section 1162. Section 1162 was amended to allow one Indian community jurisdiction over intratribal offense and to establish which states have assumed exclusive jurisdiction under Public Law 280.

In 1958 Public Law 280 was extended to Alaska Indians by Public Law 615. Section 1162 had provided that Alaska had jurisdiction over all Indian country within the territory. Prior to 1958, the Metlakatla Indians had a system of courts and police which enabled them to exercise jurisdiction over minor Indian offenses. The 1958 act had the effect of ". . . eliminating the legal basis for the jurisdiction exercised by the community over minor offenses." H. Rep. No. 91-1545, as reported in 1970 U.S. Code Cong. Admin. News 4784. The 1970 amendment was passed to allow the Metlakatla Indian community ". . . to exercise jurisdiction over minor offenses concurrent with the State of Alaska." *Id.*, at 4783. Both the Interior De-

[46] Section 7 was later technically repealed and replaced by 25 USC Section 1321 of the Indian Civil Rights Acts. The alteration of the language in Section 1321 was not designed to change the jurisdictional outcome.

partment and the United States Attorney General's Office stated that the tribe's concurrent jurisdiction would be limited to jurisdiction over its own members. *Id.*, at 4787.

Congress and the Metlakatla Tribe concluded that Public Law 280 abolished tribal jurisdiction over misdemeanors committed by tribal members and gave such exclusive jurisdiction to the states. Therefore, Indian powers of self-government in criminal matters were eliminated in mandatory Public Law 280 states. To the extent that optional states were offered jurisdiction coextensive with that offered mandatory states, optional states received jurisdiction exclusive of Indian tribes. In the opinion of the Washington State Attorney General, to the extent that State of Washington assumed criminal and civil jurisdiction under RCW 37.12, Laws of 1963, that jurisdiction is exclusive of tribal jurisdiction. A.G.O. 63-64 No. 68, November 8, 1963."[47]

Further evidence that Public Law 280 states the opportunity to assume jurisdiction exclusive of Indian tribes can be found in language added to 18 USC Section 1162 in 1970. Prior to 1970, 18 USC Section 1162 provided: "The provisions of Sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section." In 1970 that section was amended to read: "The

[47] In that opinion at page 12, the Attorney General refers to the attempt by several of the Indian tribes through their tribal attorneys to convince a legislative council sponsoring the state act in question that the bill should be amended to allow concurrent jurisdiction on the part of Indian tribes. Members of the council refused to so amend the bill, nor was any such amendment introduced in the legislature prior to enactment into law.

provisions of Section 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in Section (a) of this section as areas over which several states have exclusive jurisdiction." The purpose of this amendment was not to create a new form of jurisdiction, but rather to make explicit that which was implicit under the Act;[46] that is, where state jurisdiction is exercised, that jurisdiction is exclusive.

The Department of Interior agrees with the State of Washington that Public Law 280 conferred jurisdiction exclusive of tribal jurisdiction upon the states. Solicitors Opinion M-36241, September 22, 1954. See, Letter of Secretary of Interior Lewis of June 4, 1954. In his letter, Secretary Lewis concluded that the effect of the language stating that criminal law shall have the same force and effect within Indian country as elsewhere within the state, gives the state full and complete jurisdiction and permits no such jurisdiction by any other body save the federal government and subordinate agencies of the State itself. *Id.*

Both state and federal courts have concluded that Public Law 280 confers exclusive jurisdiction on state governments. *Anderson* v. *Gladden,* 188 F. Supp. 666, 676, aff'd., 293 F.2d 462, 466 (9th Cir. 1961), cert. den. 368 U.S. 949 (1961); *Robinson* v. *Sigler,* 187 N.W.2d 756, 759, 187 Neb. 144 (1971); *Confederated Bands and*

[46] The new language was "... descriptive only, and is not meant to change the meaning of section 1162(c). It was added because subsection (c) refers to the Indian country listed in subsection (a) and that list includes Indian country not under state jurisdiction as well as areas that are..." Letter to Chairman, House Judiciary Committee from Senator Sleves, Grovel and Ervin, Members of the Senate Committee on the Judiciary, October 14, 1970, appearing in Congressional Record of November 16, 1970 at 37354.

Tribes of Yakima Indian Nation v. *State of Washington,* District No. 2732 (E.D. Wash., 1972), aff'd., 550 F.2d 443 (1977), however, Public Law 280 was held to unconstitutionally deny equal protection of the law in a remand in the same case before the Ninth Circuit. See, —— F.2d ——, No. 74-1225, April 29, 1977.

In 1953 the United States Congress passed legislation permitting states to assume criminal and civil jurisdiction over Indians and Indian reservations. In 1957, pursuant to that act, the State of Washington enacted legislation permitting the Suquamish Indian Tribe, among others, to cede criminal and civil jurisdiction over the tribe and its reservation to the state. RCW 37.12.020-070. In 1959, the Suquamish Indian Tribe ceded said jurisdiction to the state.

In 1963 new legislation which did not require the consent of Indian Tribes, obligated the State of Washington to assume criminal and civil jurisdiction over Indians and Indian reservations. RCW 37.12.010-070. In a proclamation dated August 26, 1971, Governor Evans returned the jurisdiction assumed by the State of Washington under the 1957 act to the Suquamish Indian Tribe (Belgrade, R. 78, Exh. E). However, the jurisdiction was held to be valid by both state, *Makah Tribe* v. *State,* 76 Wn.2d 645, 457 P.2d 590 (1969) and federal courts. *Quinalt Tribe* v. *Gallagher,* 368 F.2d 648 (9th Cir., 1966), cert. den. 387 U.S. 907.

The 1963 act established criminal and civil jurisdiction over Indians and Indian reservations within this state. That statute expressly provided that such assumption of jurisdiction "... shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the

United States or subject to a restriction against alienation imposed by the United States." RCW 37.12.010. However, the act applies even to Indians when on their tribal or allotted lands in eight subject matter areas: Compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and "... operation of motor vehicles upon the public streets, alleys, roads and highways."

Since the State Act exempts from its assumed jurisdiction only Indians when on tribal or allotted lands, the tribe had no power over Oliphant. The state took exclusive jurisdiction over Oliphant's crime through RCW 37.12.010. Of course, to the extent the tribe never had jurisdiction over Oliphant, Public Law 280 is not determinative. State jurisdiction is appropriate and has been exercised.

RCW 37.12.010(8), provides for exclusive state jurisdiction on public highways, whether Indians or non-Indians are involved. See, A.G.O. 63-64 No. 68—Bel garde was involved in the operation of his motor vehicle on the public highways of the state of Washington, roads maintained by the Kitsap County Road Department, (Belgarde R. 78, Exh. A). Insofar as Public Law 280, and the state enactment thereunder, provide exclusive jurisdiction, tribal court jurisdiction does not exist over public highways. Furthermore, the Suquamish Tribal Code provides for no vehicle code violations. This is an appropriate area for enforcement of the laws of the State of Washington by and through the Kitsap County Prosecutor's Office. This writer is personally familiar with numerous cases arising on the roads of the reservation and prosecuted in district

court. Furthermore, tribal courts have not been exercising traffic jurisdiction over non-Indian residents of the reservation. See, n. 36, 38, *supra.*

VII.

THE PASSAGE OF THE INDIAN CIVIL RIGHTS ACT OF 1968 IS CONSISTENT WITH THE LIMITATIONS OF TRIBAL POWERS OF SELF-GOVERNMENT TO JURISDICTION OVER INDIANS

In 1968 Congress passed the Indian Civil Rights Act, Act of April 11, 1968, 25 USC 1301-1341. The act imposed certain due process requirements upon tribal courts handling any person subject to the tribal power of self-government. 25 USC 1302. The act further limited the punishment that may be imposed by tribal courts to a term of six months imprisonment or a fine of $500.00 or both. The fact that the act extended constitutional safeguards to all persons, rather than to Indians alone, is not a grant of tribal jurisdiction over non-Indians in criminal matters.

The Indian Bill of Rights protects more than substantive and procedural criminal rights. In *Dodge* v. *Nakai,* 298 F. Supp. 26 (D.Ariz. 1969), non-members of the Navaho tribe and director of the legal services program serving the people of the Navaho reservation became involved in a dispute with a member of a tribal committee. As a result of Mitchell's conflict with members of the tribe, the tribal council passed a resolution removing him from the reservation. The tribe's only justification for such removal was obnoxious conduct consisting of a laugh interpreted to be scornful by a tribal committee, and so obnoxious as to provoke an assault by a tribal member upon him. The district court held that under 25 USC 1302 (8) the tribe

had deprived Mitchell of liberty or property without due process of law. The court concluded that the order of exclusion constituted an unlawful bill of attainder as well. 298 F. Supp. 26.

In *Dodge,* the court refers to the legislative history of the Indian Civil Rights Act as a justification for its conclusion that the act was intended to protect Indian and non-Indian alike. Hearings on Constitutional Rights on American Indians Before Subcommittee on Constitutional Rights, Senate Judiciary Committee, 89 Cong. First Sess., page 189, 260-7. (1965). However, the portions of legislative history just cited and relied upon by the court do not deal with criminal matters involving non-Indians. Those references reveal the difficulties non-Indian creditors, bankers and rentors have in collecting their bills and rents; as well as problems of free speech and religious freedom among tribal residents of an Indian reservation.

The Indian Civil Rights Act grew out of a desire in Congress to limit the unchecked authority of tribes over Indian members. Congressmen were astounded to discover that reservation Indians did not possess constitutional rights conferred on other Americans by the Bill of Rights. See, Cong. Rec. 35472-35473, December 7, 1967.

Even the language of the Act implies a limited jurisdiction in the tribes; 25 USC Section 1302 prohibits the denial of certain rights by an Indian tribe "... exercising powers of self-government."

Supporters of the Indian Civil Rights Act consistently refer to the Act as a measure limiting tribal court power in dealing with tribal members. See, Remarks of Representative Reifle, 114 Cong. Rec. 9552-53

(April 10, 1968); Remarks of Senator Ervin, 113 Cong. Rec. 13473 (May 23, 1967). Further evidence that congress considered tribal powers to be limited to jurisdiction over non-Indians can be found in a Solicitor's Memorandum submitted in Hearings on Constitutional Rights of American Indians Before Subcommittee on Constitutional Rights of Senate Judiciary Committee, 87th Part I-III, 88th Cong. Part IV, 1961-1964. These hearings resulted in the passage of the Indian Civil Rights Act of 1968. The Solicitor's Memorandum regarded jurisdiction of the tribal court and courts of Indian offenses over unrestricted lands. Memo. Sol. I.D., April 27, 1939. On page 263 of those hearings the nature of tribal court authority is noted to be personal, rather than territorial, in nature. The opinion concludes that "... the tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely the jurisdiction over persons."

During the course of the hearings Congress proceeded on the assumption that tribal courts lacked jurisdiction over non-Indians. In the 1964 Summary Report of Hearings and Investigations of Constitutional Rights of the American Indian (1964), the Committee considering the Indian Civil Rights Act concluded that state or federal courts may assume jurisdiction to try offenses lesser than the Major Crimes Act when committed by non-Indians against Indians. The committee also made reference to the testimony of a judge of the Hualapai Tribe in which she indicated that a non-member of the Hualapai Tribe could not be tried in the tribal court since that court lacked the power to try a non-member. *Id.* at page 8. See, Statement of the President of Rosebud Sioux Tribe, Cato

Valandra, in the 1961-64 hearings, *supra* at pages 679-80. Tribal courts as a practical matter have not claimed jurisdiction over non-Indians in the past. Justice and the American Indian, National American Indian Court Judges Assn., Volume 4, page 4 (1974). See, n. 36, *supra*. Therefore, the writ of habeas corpus exists primarily as a remedy for individuals over whom tribes illegally attempt to take jurisdiction. See, *Dodge* v. *Nakai, supra*.

It is inappropriate to extend the jurisdiction of tribal courts to non-Indians. Article 3 courts have complex procedural systems designed to show correct and fair decision making. They allow appellate review to assure uniformity in decision making and minimize the possibilty of bias or error in individual cases. However, Indian tribal courts have very few of these complex assurances of fairness and accuracy in decision making. Few tribal judges are trained in the law of the states and of the United States, and few tribes have effective systems of appellate review. Appellate decisions are apparently not published. See, American Indian Policy Review Commission, Minority Report of Congressman Lloyd Meeds, 1977.

The Indian Civil Rights Act of 1968 provides only limited review in federal courts insofar as tribal decisions impinge on minimal constitutional guarantees. There is no review in federal court for decisions of Indians courts when the tribal court decisions are merely erroneous unless the error reaches constitutional magnitude. Furthermore, the Indian Civil Rights Act does not guarantee counsel at public expense when a defendant does not have sufficient funds to hire his own counsel, and does not prevent the establishment of a state religion in an Indian tribe. It

does not assure non-Indian citizens of the right to grand jury indictment in certain cases and a jury trial in cases other than those for which imprisonment will follow. Furthermore, many courts have applied these basic portions of the Bill of Rights included in the Indian and Civil Rights Act in a watered down fashion to allow for consideration of Indian cultural factors.[49] Congress has determined that this dilution is appropriate to preserve Indian culture, and the American Indians have consented. No such justification exists for the dilution of the constitutional rights of non-Indians.

CONCLUSION

The petition for writ of habeas corpus should issue to discharge Oliphant and Belgarde from the custody of the Suquamish Tribe.

Respectfully submitted,

CARMON DANNY CLEM
Prosecuting Attorney

PAUL S. MAJKUT
Deputy Prosecuting Attorney

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[49] See, n. 39, *supra*.

APPENDIX

APPENDIX

(SEAL)
Kitsap County
614 Division Street
Port Orchard, WA 98366
Area Code 206, Tel. TR 6-4441

BOARD OF COMMISSIONERS
Frank Randall, District 1
William H. Mahan, District 2
Gene Lobe, District 3

August 6, 1974

The President, Richard M. Nixon
The White House
Washington, D.C.

My Dear Mr. President:

Enclosed you will find petitions filed by some 750 persons which constitutes nearly all the permanent residents within the historic boundaries of the Port Madison Indian Reservation.

The Board of Commissioners is acting as forwarding agent for these petitions because of our complete agreement with the concerns and the ideals enunciated on the petitions as well as our concern about the rather tense situation that is developing here in this county. We feel very strongly that if the Indians' objectives were carried out it would constitute a flagrant example of government without representation. There are, according to our records, approximately 50 members of the Port Madison Tribe residing within the historic boundaries (23 of them, incidentally, have signed the enclosed petitions) and to have this small handful of persons acting as a government for some 2,000 non-Indian landowners, one of whom have the right to elect anyone to the Tribal Council or to have any say about their representation would be, we believe, clearly unconstitutional.

We recognize there are many Reservations with many degrees and types of problems but we firmly believe that in this instance what these people are asking for is right and proper.

The delay in forwarding these was brought about by the Board of Commissioners because of some rather delicate negotiations with the Suquamish Tribal Council regarding a sewerage system for the community of Suquamish. The Board did not want to "rock the boat". Those negotiations now have, however, broken down completely and so we are therefore forwarding these petitions on to you.

Please let us know if we can answer any questions.

Very Sincerely Yours,

KITSAP COUNTY BOARD OF COMMISSIONERS

/s/ GENE LOBE
Gene Lobe, *Chairman*

/s/ WILLIAM H. MAHAN
William H. Mahan, *Commissioner*

/s/ FRANK RANDALL
Frank Randall, *Commissioner*

FR:pb

Enclosures

Copy to:
Senator Magnuson
Senator Jackson
Senator Abourezk
Congressman Meeds
Mrs. Ky Dewar
Mr. Travis Baker
President Gerald Ford 8/28/74

The present Suquamish Indian Tribal government in Kitsap County, Washington, is claiming jurisdiction over the property and persons of all residents living within the original exterior boundaries of the Port Madison Indian Reservation. Therefore the undersigned persons who own property, or reside within these boundaries, petition the President and the Congress of the United States to uphold the validity of our patent, or fee simple lands; and to be relieved of the claims of the present Suquamish Tribal government that all residents in this area are under their jurisdiction and shall be governed by them without representation. These patent lands were originally purchased from Indian allotted lands, and there is nothing in the original abstracts that reserves the right of jurisdiction over the new owners, by the Suquamish Indians.

We respect the Indian right to govern themselves, if that be their wish, but we also ask that our rights be protected by allowing us to maintain our status as citizens of Kitsap County, the State of Washington, and the United States of America. No Tribal government of the Suquamish, until the present one, has insisted on sovereignty rights over the non-Suquamish Indian population.

We therefore, in the interests of the peace and welfare of all citizens living in this area, do petition that the patent lands be deleted from the original boundaries of this reservation, and that this area be recognized for what it presently *is:* approximately 2600 acres of allotted lands owned by individual Indians and lived on by 50 members of the Suquamish Lndian Tribe; approximately 4700 acres of fee simple land lived on by 2928 non-members of the Suquamish Tribe; and 36 acres of tribal land, leased for 50 years to non-Indians.

NAME	ADDRESS	DATE

(SEAL)
Kitsap County
614 Division Street
Port Trchard, WA 98366
Area Code 206, Tel. TR 6-4441

BOARD OF COMMISSIONERS
Frank Randall, District 1
William H. Mahan, District 2
Gene Lobe, District 3

August 29, 1975

The President, Gerald Ford
The White House
Washington, D.C.

My Dear Mr. President:

The enclosed letter and copy of petition were sent to you by this office a year ago. At the present time no response has been received. The situation that occasioned the petition has become even more critical with the Federal Court decision last week that the Indian Tribe has concurrent police jurisdiction with the state within the entire historic boundaries of the reservation. Bear in mind that two-thirds of the Indian lands have been sold and are now fee-patent land under non-Indian ownership. The courts of our land seem to be of no help and we firmly believe it will take congressional action to rectify this inequitable situation.

Copies of the entire 750 names are on file in this office. If you desire, we will forward them on to you.

Very sincerely yours,

KITSAP COUNTY BOARD OF COMMISSIONERS

/s/ GENE LOBE
Gene Lobe, *Chairman*

/s/ WILLIAM H. MAHAN
William H. Mahan, *Commissioner*

/s/ FRANK RANDALL
Frank Randall, *Commissioner*

FR:pb

Enclosures

cc: Senator Magnuson, Senator Jackson, Senator Abourezk, Congressman Meeds, Mrs. Ky Dewar, Congressman Joel Pritchard.

ERRATA SHEET

Page	Line	Change
4		Footnote 1, after "July 20, 1977" insert ", July 12, 1977."
5	19	After "33 Stat. 1048" insert ", 1078."
26	3	After "Cranch)" insert "87, 142-143."
26	32	Strike "20" insert "17"
27	2	After "Id" insert ", at 20."
27	13	After "Id" insert "at 17."
29	24	The last sentence of the quotation beginning on line 24 is textual and not part of the quotation.
29	30	After "unconstitutional:" insert "Id. at 593." After "state." insert "Id. at 594."
33	30	After "enactments." insert "Id. at 539."
34	11	After "164" insert "172."
35	31	After "Argument I, page" strike "15, 16, 18," and insert "25-27,"
49	6	Strike "22" and insert "922"
59	3	After "however," insert "RCW 37.12, the implementing legislation under"
59	23	After "However, the" insert "jurisdiction assumed under the 1963 Act was expressly saved. Id. The 1963 assumption of"
59	25	Strike "645" and insert "485"
64	5	Strike "36" and insert "37"

Supreme Court, U. S.
FILED
OCT 14 1977
MICHAEL RODAK, JR., CLERK

No. 76-5729

In the Supreme Court of the United States

OCTOBER TERM, 1977

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
PETITIONERS

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

JAMES W. MOORMAN,
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Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
PETITIONERS

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Suquamish Indian Tribe has jurisdiction to try non-Indians for misdemeanors when the acts alleged occurred within the Fort Madison Reservation and adversely affect tribal interests.[1]

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[1] In our Memorandum of June 1977, urging this Court to grant Oliphant's petition, we suggested that the *Belgarde* case was distinguishable because the events in *Belgarde* had taken place on non-trust land. In addition, we questioned whether *Belgarde* was a case of sufficient public importance

INTEREST OF THE UNITED STATES

In its role as guardian, the United States has assumed major responsibilities for law enforcement on Indian reservations. These cases require construction of the principal statute defining federal criminal jurisdiction in "Indian country." On the other hand, the United States has for some years been engaged in fostering tribal self-government, providing funds for Indian law enforcement programs. For these reasons, we participated in the district court as *amicus curiae* in the *Oliphant* case, and this Court solicited the views of the United States with respect to the petition in these cases. We deem it appropriate, in the circumstances, to express our views on the merits.

STATEMENT

1. These cases arise out of petitions for habeas corpus in the United States District Court for the Western District of Washington, challenging the jurisdiction of the Suquamish Indian Provisional Court to try petitioners, non-Indian residents of the Port Madison Reservation in Kitsap County, Washington, for misdemeanors alleged to have been committed within the boundaries of the reservation. The peti-

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to warrant deviation from normal appellate processes—the judgment not having been reviewed by the court of appeals. Accordingly, we stated the "question presented" by *Oliphant* only, and urged that certiorari be denied in *Belgarde*.

We assume, however, that the Court has determined to review both cases and we therefore address the issues raised by both. Moreover, the submission we now make applies equally to the two cases.

tion of Mark David Oliphant was filed on August 23, 1973, and denied by the district court on April 5, 1974 (Pet. App. A 1-7); that denial was affirmed by the Court of Appeals for the Ninth Circuit on August 24, 1976 (Pet. App. A 8-33; 544 F. 2d 1007). The petition of Daniel B. Belgarde was filed on November 6, 1974, and denied, upon recommendation of a United States Magistrate (Pet. App. A 34-49), on August 18, 1975 (Pet. App. A 50-51). Belgarde filed a timely notice of appeal to the Court of Appeals for the Ninth Circuit (Pet. 14), but no decision has been rendered by that court. This Court granted a joint petition for a writ of certiorari on June 13, 1977.

2. The material facts in these cases are set forth in the district court opinion in *Oliphant* (Pet. App. A 1-4), and in the Report and Recommendations of a United States Magistrate in *Belgarde* (Pet. App. A 34-36), which the United States District Court for the Western District of Washington subsequently adopted (Pet. App. A 50-51).

The Port Madison Reservation is located entirely within the State of Washington. Created by the Treaty of Point Elliott of January 22, 1855 (ratified in 1859, 12 Stat. 927), the reservation was a remnant of the aboriginal territory of the Suquamish and other allied Tribes and is still the home of the Suquamish Indian Tribe.[2] The reservation consists

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[2] The Port Madison Reservation, involved here, is in fact the first of four non-contiguous areas the Tribes reserved in the treaty. Art. II; See Royce, *Eighteenth Annual Report of the Bureau of American Ethnology* 798-801 and Maps 60 and 63 (1899). There was also a larger "general reservation," to

of more than 7,000 acres, of which approximately 36 percent are allotments held in trust for individual Indians pursuant to the Indian General Allotment Act of 1887 (24 Stat. 388, 25 U.S.C. 331 *et seq.*) and its amendments. In addition, there remain 41 acres of tribal lands, held in trust by the United States.

The Suquamish Tribe is organized under the Indian Reorganization Act of 1934 (48 Stat. 984, 987, 25 U.S.C. 476 *et seq.*). In 1965 the Tribe adopted a Constitution and By-Laws, which the Secretary of the Interior approved,[3] and in 1973 it enacted a Judicial Code creating a tribal trial court and court of appeals (Pet. App. B 39 *et seq.*). Section 3 of Art. III of the Code (*id.* at 41-42) states that the tribal court shall have original jurisdiction over all but "major crimes" [4] committed by Indians or non-Indians occurring anywhere on the reservation. The code was enacted by the tribal membership in full meeting

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which the President was authorized to remove the Tribes signatory to the Treaty of Point Elliott as well as "all the Indians living west of the Cascade Mountains in the [Washington] Territory." Arts. III and VII. The Suquamish, however, were never so removed and the Port Madison Reservation became their exclusive domain. By Executive Order, the reservation was enlarged in 1864 (see Royce, *supra*, at 834-835 and Maps 61 and 62). Subsequently it was slightly diminished by an Agreement of 1904, ratified by Congress in 1905. 33 Stat. 1078.

[3] Selected portions of the Constitution and By-Laws are reprinted at Pet. App. B 6-8.

[4] As defined in 18 U.S.C. 1153; but see the limitations on tribal powers set forth in the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. 1302.

(Supplementary Record 4, hereinafter, "Supp. R.")[5] pursuant to Art. IX of the Constitution and By-Laws, and is considered by the Department of Interior as valid without secretarial approval. Prior to the Oliphant incident, notices had been placed in prominent places at the entrances to the Port Madison Reservation that entry onto the reservation would be deemed implied consent to the jurisdiction of the Suquamish tribal court (Supp. R. 8).

3. In August 1973 the Suquamish Tribe was planning to celebrate its annual Chief Seattle Days festival. Anticipating that a great many people would be congregating in a small area near the traditional tribal camp grounds, the Tribe requested that Kitsap County provide law enforcement assistance, but only one deputy was available for a single eight-hour period during the festival weekend. The Tribe also requested law enforcement assistance from the Bureau of Indian Affairs, but was told that it would have to provide its own law enforcement out of tribal funds with tribal personnel (*id.* at 11).

On August 19, 1973, during Chief Seattle Days, at an early-morning hour, Mark David Oliphant, a

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[5] The record and supplementary records cited here are those in the court of appeals. There was no evidentiary hearing in the *Oliphant* case. Counsel for the Tribe had made a number of factual assertions in his Memorandum of Authorities of September 10, 1973 (Supp. R. 1-13) and Additional Memorandum of Additional Respondents of January 14, 1974 (Supp. R. 116-155). The facts so asserted were attested to by Tribal Chairman Richard Belmont, Jr. (Supp. R. 156).

non-Indian resident of the reservation (Supp. R. 8), was arrested by tribal authorities for assaulting a tribal officer and resisting arrest (*id.* at 1, 11).[6] The Bureau of Indian Affairs Incident Complaint Report alleges that while tribal deputies had been patrolling the encampment grounds, they had come upon Oliphant "beating up some of the people who were camping there" (Ex. U.S.-8 to United States Memorandum of Authorities, Supp. R. 101-115), and that when the deputies tried to break up the fight, Oliphant assaulted one of them and tried to run away, but was caught and arrested (Ex. U.S.-8). The alleged acts of Oliphant and his arrest both occurred upon the land held in trust for the Tribe by the United States.

Oliphant was arraigned before the tribal court, and bail was set at $200. He did not put up bail and was briefly incarcerated in a local city jail until his release on his own recognizance.[7] On August 23, 1973, Oliphant petitioned for a writ of habeas corpus in the United States District Court for the Western District of Washington, pursuant to 25 U.S.C. 1303 (the Indian Civil Rights Act of 1968), challenging the jurisdiction of the Suquamish Provisional Court to try him, a non-Indian, for acts allegedly committed on the reservation (Record on Appeal, hereinafter "R.",

[6] See Chapter III, Tribal Code (Pet. App. B 47): Assault (30 days and/or $60); resisting arrest (60 days, $120) (Pet. App. B 48, 64).

[7] The city houses tribal prisoners by agreement with the United States Department of the Interior (Pet. App. A 2).

1-4).[8] No further action has been taken in the tribal court pending this Court's decision.

4. Daniel B. Belgarde, a non-Indian resident of the Port Madison Reservation, was arrested by tribal authorities on October 12, 1974, on a state highway on the reservation. According to the reports of tribal police officers, Belgarde had been driving recklessly and at high speed on the streets of Suquamish, Washington (which is located wholly within the boundaries of the reservation), pursued by two tribal police vehicles. When the police cars succeeded in blocking his path, it was alleged, Belgarde collided with one of them. Thereafter, Belgarde submitted to arrest. The tribal officers then called the Kitsap County Sheriff's Office, and an officer of the Sheriff's Office and a state patrolman arrived. Neither would take any action against Belgarde (Pet. App. A 35).

Belgarde was taken by tribal police officers to Port Angeles City Jail, another contract holding facility for the Suquamish tribal court, where he posted bail and was released. He was arraigned on October 18, 1974, and charged under the Tribal Code with "recklessly endangering another person" (on a county road) and injuring tribal property (on the state

[8] The district court did not address the issue of post-release eligibility for habeas corpus relief. The court of appeals, however, held that "Oliphant's release on his own recognizance [on August 24, 1973] did not deprive the district court of [habeas corpus] jurisdiction," citing *Hensley* v. *Municipal Court*, 411 U.S. 345 (Pet. App. A 9). Respondents do not now challenge this holding.

highway).[9] Further proceedings were held in abeyance by the tribal court pending disposition of Belgarde's petition for habeas corpus which was filed on November 6, 1974, in the United States District Court for the Western District of Washington, and no further action has been taken (Pet. App. A 35-36).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. These cases present a question of Indian law of first impression. The decisions of the district court and the court of appeals in *Oliphant* appear to be the first reported decisions ever to have squarely decided whether Indian tribal courts have jurisdiction over offenses committed by non-Indians on the reservation. During the 19th Century, two opinions of the Attorney General (2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855)) and *dictum* in a single federal case (*Ex parte Kenyon*, 14 Fed. Cas. 353 (C.C., W.D. Ark.) (No. 7,720)) stood for the proposition that tribal courts lacked such jurisdiction. But the matter is ripe for re-examination, taking into account both historical understandings and current realities.

Since 1855, federal Indian policy has changed direction a number of times, and the impact of each phase is visible in contemporary Indian life. As a consequence of late 19th and early 20th Century assimilationist policies, many reservations today are "check-

[9] See Suquamish Law and Order Code, Chapter III, Art. I, Sections 44 (Injury to Public Property: 30 days or $100) and 59 (Recklessly Endangering Another Person: 6 months or $500), Pet. App. B 59 and 63.

erboards," inhabited by Indians holding trust allotments or living on tribal trust lands and non-Indians holding and living on lands held in fee, the latter sometimes (as in these cases) outnumbering the former. On the other hand, due in large part to the Indian Reorganization Act of 1934, tribal identity has been reinforced and tribal governments have been revitalized.

Most recently, the main thrust of federal policy has been to strengthen tribal autonomy, as is reflected in such enactments as the Indian Civil Rights Act of 1968 (82 Stat. 77, 25 U.S.C. 1301 *et seq.*) and the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203, 25 U.S.C. (Supp. V) 450 *et seq.*). Functioning tribal governments have, additionally, received funds, like other political subdivisions, from the United States under the general revenue sharing program (State and Local Fiscal Assistance Act of 1972 (86 Stat. 919, 925, 31 U.S.C. (Supp. V) 1227(b)(4)) and State and Local Fiscal Assistance Amendments of 1976 (Pub. L. 94-488, 90 Stat. 2341) and from the Law Enforcement Assistance Administration under the Omnibus Crime Control and Safe Streets Act of 1968 (82 Stat. 197, 209) and its amendments (42 U.S.C. 3781(d)).

At present, according to the Department of Interior, tribal courts are operating on approximately 71 reservations and more than 30 Tribes have enacted ordinances asserting criminal jurisdiction over non-Indians. This is, at least in part, a reflection of Indian disappointment with the way in which some of the States that have assumed jurisdiction under

the Act of August 15, 1953, 67 Stat. 588 (Public Law 280), have carried out law enforcement activities on the reservations. See 1 Justice and the American Indian, *The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations*, National American Indian Court Judges Association 5-10 (1974). As these cases demonstrate, state officials do not always prove responsive to tribal needs. Federal authorities, on the other hand, are often remote and unavailable to protect tribal interests. See Hearings on S. 1 and S. 1400 (Reform of the Federal Criminal Laws) before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., Part VIII, pp. 6469 *et seq.* (1973).

In many instances, therefore, the role of tribal law and tribal courts is to fill a hiatus. In our view, assertion of tribal jurisdiction, within the limits of existing law, is a positive development, consonant with the dual goals of increased Indian self-government and improved law enforcement on the reservation.

To be sure, this Court cannot, in these cases, precisely fix the boundaries of tribal jurisdiction, particularly with respect to non-Indians. Nor is it possible at this time to anticipate and solve all the problems to which exercise of tribal power may give rise. Perhaps, at the end of the day, further legislation will be needed. But whether that is so depends in large measure upon an authoritative interpretation of present law. That is, of course, the province of the Court.

2. We believe that existing law permits the assertion of tribal criminal jurisdiction with respect to minor offenses throughout Indian reservations whenever tribal interests are affected. And that includes cases like these, in which a non-Indian resident of the reservation assaults tribal officers or damages tribal property.

In order to establish that proposition, we address the several arguments against the assertion of tribal jurisdiction: (a) that it never existed with respect to non-Indians, except insofar, if at all, as it was conferred by delegation from the United States; (b) that any such authority was voluntarily surrendered by the Tribe more than a century ago; (c) that tribal criminal jurisdiction over reservation offenses committed by non-Indians was pre-empted by federal statutes (the predecessors of 18 U.S.C. 1152) that made federal law and federal courts exclusive in such cases; and, finally, (d) that the State of Washington, pursuant to Public Law 280, has validly asserted, and not retroceded, exclusive jurisdiction to deal with situations like those presented here. In very brief outline, our responses are these:

(a) We begin (*infra*, pp. 13-20) by establishing that jurisdiction to try non-Indians who commit offenses on lands reserved by the Tribe, at least when they implicate tribal interests, is an aspect of residual tribal autonomy which survived the loss of external sovereignty. Presumptively, we say, the Tribe has retained such jurisdiction and the only question is

whether it has been lost by voluntary surrender or taken away.

(b) To determine whether there is any basis for suggesting that the Suquamish gave away the jurisdiction now asserted, we briefly examine the Treaty of Point Elliott and the subsequent Agreement of 1904 (*infra*, pp. 20-25). Our conclusion is that there was no voluntary surrender.

(c) We turn next (*infra*, pp. 25-46) to the principal issue: whether 18 U.S.C. 1152 ousts tribal jurisdiction in those cases in favor of exclusive federal jurisdiction. On this point, we present two alternative submissions. The first is that, since the Treaty of Point Elliott should be read as reserving exclusive criminal jurisdiction to the Tribe with respect to offenses committed on the retained lands, Section 1152 is by its own terms inapplicable. We note that, today, this conclusion encounters no insuperable obstacles because the Indian Civil Rights of 1968 has enacted procedural safeguards and severely limited the sentencing powers of tribal courts.

Alternatively, we submit that if the "treaty" exception of Section 1152 is not satisfied, nevertheless the assertion of federal jurisdiction does not oust any subsisting tribal authority. As a matter of statutory construction, applying traditional presumptions, we conclude that Section 1152 only imposes a *concurrent* federal jurisdiction in cases like these.

(d) Finally, we allude to the state claim of jurisdiction (*infra*, pp. 46-59). We advert to the question whether Washington's 1963 statute, purportedly

enacted pursuant to Public Law 280, reaches the *Oliphant* case (where the incident occurred on tribal trust lands), and whether, for both cases, that statute validly pre-empts concurrent tribal jurisdiction. But we do not attempt to resolve those issues, pointing out that the court of appeals has invalidated the 1963 law on constitutional grounds in another case which is now on appeal to this Court. We also note that other non-constitutional arguments, involving a construction of Public Law 280, cast doubt on the validity of the state statute.

In those circumstances, we urge the Court not to decide these cases until it has determined what action it will take in the pending *Yakima* case (*Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388, appeal docketed September 12, 1977), and, if the Court grants plenary review there, to set these cases for argument at the same time.

ARGUMENT

THE SUQUAMISH TRIBAL COURT HAS JURISDICTION TO TRY AND PUNISH MINOR OFFENSES COMMITTED ON THE PORT MADISON RESERVATION BY NON-INDIANS AGAINST INDIANS OR INDIAN PROPERTY OR WHICH OTHERWISE SIGNIFICANTLY AFFECT TRIBAL INTERESTS

A. The Presumption In Favor Of Tribal Jurisdiction

1. Speaking for the United States, it is appropriate that we begin by reminding ourselves—as the Court has in almost all its decisions from *Worcester* v. *Georgia*, 6 Pet. 515, to *United States* v. *Antelope*, No. 75-661, decided April 19, 1977—that the surviving In-

dian Tribes within this country were once independent nations, enjoying all the powers of sovereign states. That historic fact retains significance because, although it might have chosen wholly to abrogate tribal autonomy from the beginning, the federal government has always recognized a measure of residual independence in the Tribes and, perhaps more than ever before, that is now the national policy. In consequence, when tribal authority is challenged, the source being known, one does not look for a delegation of power; the focus is, rather, upon whether there is evidence that it has been lost. And, in answering that question, all official acts, legislative or executive, by the federal or state governments that are claimed to deprive the Indians of their residual sovereignty must be examined critically and ambiguities resolved in favor of tribal autonomy. See, *e.g.*, *United States* v. *Nice*, 241 U.S. 591, 599-601; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174; *DeCoteau* v. *District County Court*, 420 U.S. 425, 447; *Bryan* v. *Itasca County*, 426 U.S. 373, 392-393.

This is not to suggest, of course, that Indians as such enjoy a presumptive exemption from the white man's laws, no matter where and how they live. Our concern is only with tribal jurisdiction within the confines of a reservation where Indians maintain tribal relations. Within those boundaries, we say, internal governmental power presumptively remains with the Tribe, at least so far as the welfare of the resident Indian community is affected. See *Williams* v. *Lee*, 358 U.S. 217.

To be sure, the tribal claim to self-rule is at its strongest when it reaches Indians alone. *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 179-180; *Fisher* v. *District Court*, 424 U.S. 382; *Bryan* v. *Itasca County*, *supra*; *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463. But, as *Williams* v. *Lee* sufficiently illustrates, tribal jurisdiction is essentially *territorial* and it normally encompasses activities by non-Indians on the reservation which importantly affect tribal members. See, also, *Warren Trading Post* v. *Tax Comm'n*, 380 U.S. 685; *Kennerly* v. *District Court of Montana*, 400 U.S. 423; *United States* v. *Antelope*, *supra*, slip op. 4-5.[10] And this is

[10] Cases like *United States* v. *Winans*, 198 U.S. 371, *Tulee* v. *Washington*, 315 U.S. 681, *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, *Menominee Tribe* v. *United States*, 391 U.S. 404, and *Antoine* v. *Washington*, 420 U.S. 194, which recognize tribal rights *beyond* the boundaries of the reservation—and presumably the Tribe's authority to control its members in the exercise of those rights—are no exception to the territorial principle. On the contrary, those cases enforce privileges which attach to *particular areas*, formerly within tribal lands, but later ceded to the United States with a reservation of certain rights.

Nor do decisions which recognize *federal* authority over Indians outside a reservation impair the principle that *tribal* jurisdiction is essentially territorial. See, *e.g.*, *United States* v. *Holliday*, 3 Wall. 407; *Perrin* v. *United States*, 232 U.S. 478; *Morton* v. *Ruiz*, 415 U.S. 199. Although federal jurisdiction over Indians is usually territorial—confined to "Indian country" (see 18 U.S.C. 1151-1153)—by virtue of the Indian Commerce Clause of the Constitution, Congress may regulate white-Indian intercourse without regard to situs.

Of course, in stressing the territorial principle, we do not mean to question the Tribe's authority, for some purposes at least, over its own members living outside the reservation,

so even though the conduct occurs on non-Indian land within a reservation.[11] *Seymour* v. *Superintendent*, 368 U.S. 351; *United States* v. *Mazurie*, 419 U.S. 544, 556-558; *DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 427 and n.2. Compare *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145.

These principles are fully applicable to the exercise of jurisdiction by courts, both in civil and criminal cases arising out of conduct within an Indian reservation. *DeCoteau*, *supra*, 420 U.S. at 427 n. 2. Thus, when both the wrongdoer and his victim are non-Indians and tribal interests are not directly implicated, state courts have been conceded competence. *United States* v. *McBratney*, 104 U.S. 621; *Draper* v. *United States*, 164 U.S. 240; *New York ex rel. Ray* v. *Martin*, 326 U.S. 496.[12] But it is otherwise when an Indian is involved, whether as a victim or wrongdoer, *Donnelly* v. *United States*, 228 U.S. 243, and, *a fortiori*, when both parties are Indians residing on the reservation. *United States* v. *Kagama*, 118 U.S. 375; *Fisher* v. *District Court*, *supra*.

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or the competence of tribal courts to deal with offences committed by members beyond the reservation. We need not here explore the limits of any such jurisdiction.

[11] Provided, of course, the reservation subsists. Compare *Mattz* v. *Arnett*, 412 U.S. 481, with *DeCoteau* v. *District County Court*, 420 U.S. 425, and *Rosebud Sioux Tribe* v. *Kneip*, No. 75-562, decided April 4, 1977.

[12] While the *McBratney* rule is often stated shortly as conceding to the state exclusive jurisdiction of all offenses by non-Indians against non-Indians, an exception may exist for actions which otherwise significantly affect tribal interests. See *New York ex rel. Ray* v. *Martin*, *supra*, 326 U.S. at 498, 500-501. Although we need not explore the breadth of that exception here, we suggest that it includes offenses against public safety which endanger the entire community, without there being any identifiable Indian "victim."

While in some of the cases in which state jurisdiction within a reservation is denied, the result is explained as immediately grounded on federal pre-emption, that is not inconsistent with recognition of inherent tribal autonomy as the starting point.[13] As the Court has consistently emphasized, the residual sovereignty of the Tribe, independently of any federal regulation, is enough to bar state courts from interfering in reservation affairs when tribal interests are implicated. See, *e.g.*, *Fisher* v. *District Court*, *supra*, 424 U.S. at 386-389.

The same principle governs when the issue is between *federal* and tribal jurisdiction. Unlike the state, the United States has plenary power to regulate Indian affairs within a reservation. But, until and unless Congress asserts federal jurisdiction, authority to resolve disputes arising on the reservation which affect Indian interests remains with the Tribe. See 55 I.D. 14, 57. Federal laws, even the Constitution, do not reach within a reservation in the absence of an

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[13] Typically, the pre-emption doctrine is invoked to oust state attempts to regulate commerce between whites and Indians and to immunize reservation Indians from state taxes. See, *e.g.*, *Warren Trading Post* v. *Tax Comm'n*, *supra*; *United States* v. *Mazurie*, *supra*; *McClanahan* v. *Arizona State Tax Comm'n*, *supra*. Even then, however, the residual autonomy of the tribes is a relevant consideration. See *Warren*, *supra*, 380 U.S. at 690; *Mazurie*, *supra*, 419 U.S. at 555-559; *McClanahan*, *supra*, 411 U.S. at 172-173; *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376-377 n. 2.

express congressional directive. See *Ex Parte Crow Dog*, 109 U.S. 556, 571-572; *Talton* v. *Mayes*, 163 U.S. 376, 384; *United States* v. *Quiver*, 241 U.S. 602, 605-606. As the Court said in *Williams* v. *Lee*, *supra*, 358 U.S. at 220, with particular reference to criminal cases, "if the crime was by or against an Indian, tribal jurisdiction * * * has remained exclusive"—unless jurisdiction was "expressly conferred on other courts by Congress." In sum, here, too, when tribal interests within the reservation are directly affected, the presumption is that tribal courts are the competent tribunal and our only inquiry is whether their jurisdiction has been taken away.

2. We submit that these principles govern both the present cases. The events underlying each prosecution occurred wholly within the boundaries of the Port Madison Reservation, the reserved portion of the aboriginal lands of the Suquamish Tribe. Although about two-thirds of the acreage is today in non-Indian hands and only a small fraction of the reservation population is Indian, there is no suggestion that the reservation has ceased to exist or that its extent has been diminished since 1905. Nor is there any doubt that the Suquamish, few as they are, maintain tribal relations: they have adopted a constitution and a code of laws, which, among other things, establish tribal courts with jurisdiction over defined offenses committed within the reservation.

In the *Oliphant* case, it is plain that the acts alleged constitute a direct interference with tribal affairs. As we detailed in the Statement, *supra*, pp. 5-6,

Oliphant was apparently disturbing Indians attending the annual tribal celebrations, being held on the few remaining acres of unallotted tribal lands, when tribal officers sought to restrain him. The charges against him are that he then assaulted one of these officers and resisted their efforts to arrest him.

The facts of the *Belgarde* case perhaps less obviously implicate tribal interests, but, in our view, they nevertheless justify the assertion of tribal jurisdiction. Although the driving incident underlying the charges occurred on non-Indian lands within the reservation, it presumably threatened the safety of Indian residents. Moreover, one of the accusations is that Belgarde "destroyed tribal property" in that, when tribal police, in a vehicle owned by the Tribe, successfully blocked his path, he deliberately or recklessly collided with the police car. That, we submit, brings the case within the principles we have just outlined.

Of course, the issue is not finally resolved when we conclude that incidents occurring within the boundaries of an Indian reservation implicate tribal interests and are therefore presumptively subject to tribal court jurisdiction. But, if this is not the end of the inquiry, it is more than a mere starting point. The presumptive authority of the Tribe to deal with the matter must inform our analysis throughout as we answer the only remaining question: Did this Tribe lose its prerogative to adjudicate cases of this kind, and, if so, how?

There are three different ways in which tribal jurisdiction can be lost: (1) by voluntary surrender,

(2) by federal supercession, and (3) by State action pursuant to congressional authorization. In the present case, all three claims are advanced and we deal with them in turn.

B. The Absence Of Voluntary Surrender

It goes without saying that tribal prerogatives can be relinquished. Sometimes, this has happened simply by the loss of tribal identity, all members voluntarily leaving the reservation, if one existed, and wholly integrating themselves into white society. No such claim is advanced here. On the other hand, tribal powers of self-government are not lost merely by failure to exercise or assert them, even over a long time. See, *Mattz* v. *Arnett*, *supra*, 412 U.S. at 497-503; cf. *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 113-117.[14]

But, subject to certain conditions (see *Kennerly* v. *District Court of Montana*, *supra*), a tribe may surrender all or part of its autonomy by a formal act. Since 1968, by virtue of congressional authorization, such a cession of jurisdiction may be made to the State

[14] Neither *DeCoteau* v. *District County Court*, *supra*, nor *Rosebud Sioux Tribe* v. *Kneip*, *supra*, remotely suggests anything of the kind. On the contrary, those decisions rest on the premise that tribal and federal authority give way to state jurisdiction *only* when the reservation is terminated or diminished by congressional action. *E.g.*, *DeCoteau*, *supra*, 420 U.S. at 427 n. 2. While the absence of a tribal government or tribal acquiescence in state jurisdiction is noted (*DeCoteau*, *supra*, 420 U.S. at 442-443; *Rosebud Sioux Tribe*, *supra*, slip op. 19-21 and n. 27), this is viewed as relevant to construing an earlier Act of Congress. There is no hint that, absent congressional action, tribal powers can be lost by desuetude.

if it is willing to accept it. 25 U.S.C. 1321. Again, that is not suggested in these cases. More relevant, however, is the common example of a surrender to the United States of some tribal authority over reserved lands, by the original treaty establishing an Indian reservation, or by subsequent agreement. It is said that happened here.

The pertinent treaty in these cases is the Treaty of Point Elliott, concluded in 1855 and ratified in 1859. 12 Stat. 927. By that agreement, the Suquamish and other allied Tribes ceded to the United States a substantial part of their aboriginal lands, reserving a tract for themselves.[15] This "reservation" was expressly "set apart * * * for their exclusive use," and it was further stipulated that "[no] white man [shall] be permitted to reside upon the same without permission of the said tribes or bands * * *." Art. II, 12 Stat. at 928. While allotments were authorized, these were to be only to members of the Tribes. Art. VII, 12 Stat. at 929; see Treaty with the Omahas, Art. 6, 10 Stat. 1043, 1044.[16]

There is in these provisions nothing arguably amounting to an abdication of the right of self-rule

[15] See note 2, *supra*.

[16] While the Treaty of Point Elliott ambiguously mentions allotments to "such individuals or families as are willing to avail themselves of the privilege," it goes on to say that such allotments are to be made "on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas," and the cited provision expressly limits allotments to an "Indian or Indians of said tribe." See *United States* v. *Celestine*, 215 U.S. 278, 286.

within the lands retained by the Tribe. On the contrary, as we elaborate in a moment (*infra*, pp. 33-34), because whites were excluded from the reservation except only as the Tribe itself might admit them, the fair implication is that the Suquamish retained full internal sovereignty, albeit over a diminished territory.

We turn, then, to Article IX of the Treaty (12 Stat. at 929),[17] which the court of appeals suggested worked a "significant surrender of internal autonomy" (Pet. App. A 11)—although not affecting tribal jurisdiction over the charges laid in the *Oliphant* case. In our view, the concession is too generous. As we read the provision, the only "surrender" is of *external* independence, not internal autonomy, and this is accomplished, not by the "extradition clause," but by the Tribes expressly "acknowledg[ing] their dependence

[17] ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

on the government of the United States." The effect of the quoted words is, we believe, the same as the common acknowledgment in earlier Indian treaties, including the Treaty of Holston with the Cherokees (Art. II, 7 Stat. 39), that the Tribe would henceforth be under the exclusive "protection" of the United States. And that acknowledgment, we know, did not deprive the Indians of their internal autonomy, or the power to punish non-whites admitted to their reservation. See *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16-17; *Worcester* v. *Georgia*, *supra*, 6 Pet. at 551-552, 553, 560-561.

The balance of Article IX does not, we submit, cede any tribal prerogatives, expressly or impliedly. There is, first, a pledge by the Tribe not to "commit * * * depredations on the property of * * * citizens [of the United States]," and not to "make war on any other tribe except in self-defence," or commit depredations on their property. In light of the general prohibition on whites or other Indians entering the reservation, this is obviously a reference to *off*-reservation acts and is no more an abandonment of internal sovereignty than a comparable agreement between two fully independent nations with a common boundary. Nor does the assumed obligation to make restitution or pay compensation when tribal members commit such depredations subtract anything from the Tribe's powers of self-government within its own territory. Again, it is an undertaking any sovereign nation might give.

Finally, we reach the clause of Article IX by which the Tribes "agree not to shelter or conceal offenders

against the laws of the United States, but to deliver them up to the authorities for trial." Read in isolation, this provision might be understood to cover offenses committed within the reservation. But, in context, the clause is no more than an extradition agreement for crimes occurring off the reservation, within the jurisdiction of the territorial government. Cf. *Ex Parte Crow Dog*, *supra*, 109 U.S. at 567-568. Indeed, in light of the exclusive focus of Article IX on depredations committed *by tribal members*, it seems unlikely that the provision reaches any but Indians. Whether that be so or not, however, we see here no surrender of internal jurisdiction: the clause does no more than obligate one sovereign to deliver up fugitives who have offended on the territory of another sovereign nation and ought, in accordance with usual international convention, be delivered up to be punished by the latter.[18]

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[18] The extradition character of the clause is perhaps even more clearly revealed when we view it in the context of the somewhat fuller "depredations" provision of the contemporary Treaty with the Blackfoot Indians (Art. 11, 11 Stat. 657, 659):

> The aforesaid tribes acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and to commit no depredations or other violence upon such citizens. And should any one or more violate this pledge, and the fact be proved to the satisfaction of the President, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. The aforesaid tribes *are hereby bound to deliver such offenders to the proper authorities for trial and punishment* and are held responsible in their tribal capacity, to make reparation for depredations so committed.
>
> Nor will they make war upon any other tribes, except in self-defence, but will submit all matters of difference between themselves and other Indians to the government of the United States, through its agent, for adjustment, and will abide thereby. *And if any of the said Indians*, parties to this treaty, *commit depredations on any other Indians* within the jurisdiction of the United States, *the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial* [emphasis added].

In sum, neither Article IX nor any other provision of the Treaty of Point Elliott abdicates the Tribe's authority to apply its own laws, through its own tribunals, to offenses committed within its reserved lands. Nor does anything in the only other agreement between the Suquamish Tribe and the United States, the Agreement of May 28, 1904, ratified by Congress the following year. 33 Stat. 1078. That transaction involved only the cession of a small portion of tribal lands, and it expressly reserves all "benefits" to which the tribal members are entitled under the earlier treaty.

Having concluded that the Suquamish did not voluntarily surrender their internal autonomy, we turn to consider whether it was taken from them. First, we examine the claim that congressional action has imposed exclusive federal criminal jurisdiction within the Port Madison reservation, except only for minor offenses committed by one Indian against another.

C. The Existence And Extent Of Federal Jurisdiction

As we have already noted, the question is not whether Congress *could have* extinguished tribal criminal jurisdiction within the Suquamish reservation, but whether it *did*. The suggestion is that, insofar as crimes involving non-Indians are concerned, this result is accomplished by 18 U.S.C. 1152.[19]

1. That provision derives from very early statutes, of 1790, 1796, 1802, 1817 and 1834. But, because the Suquamish Treaty was signed in 1855 and ratified in 1859, we need only go back as far at 1854, when the 1834 Act (4 Stat. 729, 733) was last amended (10 Stat. 269, 270). In all material particulars, the law was then settled in its present form. The provision extends the federal criminal laws to "Indian country"—which includes all lands within an Indian reservation, whether patented or not and regardless of the race of the owner (18 U.S.C. 1151)—with three exceptions:

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[19] The Major Crimes Act, 18 U.S.C. 1153, is irrelevant to these cases since, (1) it reaches only offenses committed by Indians, and (2) the only offenses covered are 13 enumerated "major" crimes, not including those involved here. That statute, first enacted in 1885, merely shows that the Congress *then* apparently thought Section 1152 covered offenses by non-Indians on reservations but not, or not always, offenses by Indians against non-Indians. Whether the Major Crimes Act supplements, or rather supersedes, tribal jurisdiction is not settled in this Court. See *Talton* v. *Mayes*, *supra*, and *Keeble* v. *United States*, 412 U.S. 205, 214. But, as a practical matter, that question has been mooted by the provision of the Indian Civil Rights Act that so limits the sentencing power of tribal courts as to disable them from dealing with major crimes. See 25 U.S.C. 1302(7).

(1) "offences committed by one Indian against the person or property of another Indian";
(2) "any Indian committing any offence in the Indian country who has been punished by the local law of the tribe"; and
(3) "any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively."

The present cases do not fall within either of the first two exceptions, limited as they are to offenses committed *by* Indians. Accordingly, we focus on the third exception, which obviously reaches cases in which the wrongdoer is not an Indian.[20] This "treaty" provision of Section 1152, written in 1854, supposes that there were then subsisting Indian treaties which reserved to the Tribe exclusive jurisdiction to deal with offenses occurring within the limits of its reservation, regardless of the race of the accused. And, as

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[20] On its face, the "treaty" exception covers *any* offense which the Tribe has reserved jurisdiction to deal with, whatever the race of the wrongdoer and victim. Of course, in the light of the first exception, it is superfluous where the accused is an Indian and the crime is against another Indian or his property. And, by virtue of *United States* v. *McBratney*, *supra*, and it progeny, the treaty exception is unnecessary to oust *federal* jurisdiction where both wrongdoer and victim are non-Indians. But see note 12, *supra*, as to the effect of the *McBratney* rule on reserved tribal jurisdiction. Thus, however broad the treaty reservation of exclusive jurisdiction. the "treaty" clause of Section 1152 is relevant in only two situations: offenses committed by an Indian against a non-Indian (and who has not been punished by tribal law) and, most relevantly, offenses committed by a non-Indian against an Indian or Indian property.

the addition of the words "or may be" indicates, it was contemplated that there would be like treaties in the future. The question is whether the Treaty of Point Elliott, signed a few months later, is one of these.

If one were to ignore all other considerations and were faithfully to apply the presumption in favor of retained tribal authority and the applicable canons of construction, an affirmative answer would seem to be called for. To begin with, there is, as we have seen, no express or implied cession of internal jurisdiction. Although the President of the United States—presumably viewed as the "Supreme Arbitrator"—is recognized as having authority to select the location of the ultimate reservation and to allot lands to individual Indian families, the treaty nowhere suggests that federal *law* shall cross the reservation boundaries. Significantly, even when it comes to violating the ban on importing "ardent spirits," the guilty Indian is not to be punished in accordance with existing law,[21] but is merely to forfeit financial benefits. Art. X, 12 Stat. at 929.

It might be argued that the treaty's silence about the applicability of federal law inside the reservation is an oversight, or that it reflects a consequence of "dependence" so well understood that it did not need

[21] There were, of course, federal laws in effect prohibiting the introduction of intoxicants into Indian reservations. See Act of June 30, 1834, Section 20, 4 Stat. 729, 732. To be sure, the Act of March 27, 1854, Section 3, 10 Stat. 269, 270, had stipulated that Indians would no longer be subject to the penalties there announced, but nothing prevented the Tribe from submitting to this law.

to be spelled out. There are several objections. The first is that this kind of speculation, adverse to Indian autonomy, is precisely what is normally forbidden in construing Indian treaties. Moreover, the Treaty of Point Elliott *does* advert to the "laws of the United States" in what we have labelled the "extradition clause" with respect to offenses committed *off* the reservation, and we cannot therefore suppose that the failure to say that such laws applied *within* the reservation as well was other than deliberate.

The suggestion of a common understanding as excusing an express provision would have greater force if contemporaneous Indian treaties *all* remained silent on the point, lending credence to the idea that nothing was said about the applicability of federal law only because it was unnecessary to state the obvious. But that is far from the fact. To be sure, many of the other treaties negotiated with the Indian Tribes of the Pacific Northwest in the mid-Nineteenth Century are equally silent on the point. See, *e.g.*, Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point-no-Point, 12 Stat. 933; Treaty of Neah Bay, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty with the Nez Perces, 12 Stat. 957; Treaty with the Quinaults, 12 Stat. 971; Treaty with the Flatheads, 12 Stat. 975. Yet, there are revealing exceptions.

Thus, on the very day that the Treaty of Point Elliott was signed (January 22, 1855), another treaty was executed with the neighboring Willamette Indians. 10 Stat. 1143. And, although very similar in other respects, the Willamette treaty expressly provides (Art. VI, 10 Stat. 1145):

> Said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians.

It is not easy to explain away as immaterial the omission of a like stipulation in the Treaty of Point Elliott. Is it not fair to conclude that, whereas the Willamette Indians were to be ruled by federal law, the Suquamish were left to govern their own reservation under their own laws?

Nor is the quoted provision of the Willamette treaty a unique exception to an otherwise consistent pattern of silence. Identical stipulations are to be found in the Treaty with the Walla-Wallas, Art. VIII, 12 Stat. 945, 948, and in the Treaty with the Indians of Middle Oregon, Art. VII, 12 Stat. 963, 966. And there are still more explicit provisions for the application of federal law within an Indian reservation. See, *e.g.*, Treaty with the Tabeguache Indians, Art. VI, 13 Stat. 673, 674-675.[22]

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[22] The relevant provision is as follows:

> That the friendship which is now established between the United States and the Tabeguache band of Utah Indians should not be interrupted by the misconduct of individuals, it is hereby agreed that for injuries done no private revenge or retaliation shall take place, but, instead thereof, complaints shall be made by the party injured to the superintendent or agent of Indian affairs, or other person appointed by the President. And it shall be the duty of the chiefs of said Tabeguache band, upon complaint being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States. And in like manner, if any robbery, violence, or murder shall be committed on any Indian or Indians belonging to said band, the person or persons so offending shall be tried, and if found guilty, shall be punished in like manner as if the injury had been done to a white man.

It may seem odd to suggest that the Suquamish, in the Mid-Nineteenth Century, retained exclusive authority to deal with white offenders against them or their property, when most Tribes had lost that privilege in the preceding decades. See Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 953-956 (1975). But federal Indian policy, even in the last century, was not constant (*id.* at 956 and n. 31), and it may well be that, in 1855, it was deemed appropriate to concede greater autonomy to the Indian Tribes.

It is not without significance that, a year earlier, Congress had amended the Indian Intercourse Act to reintroduce the "treaty" exception—omitted in 1834—and to add, for the first time, the "double jeopardy" exception. See *supra*, p. [illegible]. Moreover, as we have noted (note 21, *supra*), the same 1854 Act also exempted Indians from the penalties imposed by the 1834 statute on the introduction of intoxicants into a reservation. And, finally, although still unwilling so to construe Section 1152, it is instructive that the Attorney General in 1855—contradicting his predecessor of 1834 (2 Op. Atty. Gen. 693, 695 (1834))—said it was wrong to foreclose the possibility "of a citizen of the United States becoming subject, in civil matters, or criminal either, to the jurisdiction of the Choctaws." 7 Op. Atty. Gen. 174, 177 (1855).

Not only had federal attitudes changed generally, but it was presumably thought proper to deal more generously with Tribes that had never warred on the United States and were, by contrast to the Indians of the Plains, peaceful fishermen. What is more, the remoteness of the Tribes of the Pacific Northwest and their settlement on relatively very small reservations, presumably justified allowing them greater autonomy than other Indians with larger reservations nearer white settlements. But, at all events, the very explicit provisions with respect to federal jurisdiction over offenses by non-Indians in earlier—and later—treaties (Clinton, *supra*, 17 Ariz.L.Rev. at 955-956, nn. 26-30), suggests that the omission of any comparable stipulation in the Treaty of Point Elliott was not inadvertent.

We anticipate the reply that such an omission in any Nineteenth Century Indian Treaty merely reflects the fact that Indian Trade and Intercourse Acts (now 18 U.S.C. 1152), making federal law applicable to reservation offenses in which both wrongdoer and victim were not both Indians, were already on the books. To exempt a reservation from federal law, it may be argued, silence was not enough; there must be an express stipulation of exclusive tribal authority. This, however, leaves unexplained why it was thought appropriate in the case of the Willamette Indians, and many others, to include in the treaty the explicit provisions we have noticed. Does it not likely indicate a proper recognition that the coastal Tribes of the Northwest were unfamiliar with the United States

Code and would assume that they retained all jurisdiction they were not surrendering by the treaty?

If that is so, "fair dealing" would seem to require an express stipulation if the intention was to deprive them of their internal autonomy. Accordingly, unless we are to impute trickery to the government's negotiators, it would seem right to construe the silences of the Treaty of Point Elliott as impliedly reserving to the Suquamish exclusive criminal jurisdiction over their diminished territory. The consequence would be that 18 U.S.C. 1152 must be held inapplicable by virtue of the "treaty" exception there announced.

2. Very few would challenge this conclusion if the Port Madison reservation had remained as it was in 1855: a small area of truly "Indian country," from which whites were expressly excluded except by consent. In that situation, it would be natural to read the Treaty of Point Elliott as entitling the Suquamish to say to the non-Indian, "you enter on condition of submitting to our laws." But in the changed conditions of today, that is no longer a realistic approach. Yet, the Suquamish—unlike other Tribes—never agreed to the white immigration, or to a revision of their treaty.[23] Nor did the Congress unilaterally terminate their reservation, open it up for non-Indian settlement,[24] or repeal the "treaty" exception to Sec-

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[23] On the contrary, as we have noted (*supra*, p. 25), as late as 1905, when a small portion of the reservation was ceded by the Tribe, the Treaty of Point Elliott was reaffirmed.

[24] By virtue of the General Allotment of 1887 and its amendments (see 25 U.S.C. 348, 43 U.S.C. 1195-1197), the unallotted or "surplus" lands of the reservation might have been "opened

tion 1152 which respected their autonomy. We are thus confronted by the difficult question how much a change in facts, with no change in law, can justify a result at odds with the original understanding.

Have intervening events created insuperable obstacles to our conclusion? Before 1968, it would have been very hard, if not impossible, fully to honor the implications of the Treaty of Point Elliott and to follow the letter of the "treaty" exception in Section

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up" to homesteaders, provided an agreement to that end was made with the Tribe. But, except for the Agreement of 1904 already discussed—which was an outright "cession" to the United States of some 48 acres—no such agreement was entered into. Nor did the Congress act unilaterally to accomplish that result. Indeed, it appears from the 1904 Agreement that, by that date, all the reservations lands had been allotted except only the 48 acres thereby ceded and a further 36 acres. See Art. II (Pet. App. B, p. 18). Presumably, that 36 acres, slightly augmented by restoration (see 25 U.S.C. 463), constitutes the present 41 acres of tribal lands.

It follows that white settlers on the reservation hold what were Indian allotments. This is, of course, contrary to the Treaty of Point Elliott and to the general legislative policy of preserving such allotments to the Indians. But, presumably, it is the consequence of the several exceptions in the law which, on the one hand, allowed sales by the Secretary of the Interior of allotments in heirship, of allotments falling to "incompetents," and of allotments surrendered in lieu of other selections, and, on the other hand, of the premature lifting of trust restrictions which enabled individual Indians themselves to sell their allotments. That was a decision which Congress itself took with respect to two specified allotments on the Port Madison Reservation in 1905 (see Pet. App. B 19), but otherwise left to the discretion of the Secretary of the Interior (see 25 U.S.C. 349, 392). The Tribe itself was not a party to any alienation of lands within the present boundaries of the Port Madison Reservation.

1152. A sufficient reason would have been the anomaly created by leaving major crimes committed by non-Indians to be tried only by tribal courts when the Indians themselves were subject to be tried in federal courts for the same offenses under the Major Crimes Act.[25] Moreover, the situation would have been intolerable on the many reservations, including the Port Madison Reservation, which then had no tribal criminal code or tribal courts.

If these were the consequences, we could not responsibly urge a construction of the Treaty of Point Elliott—or any other Indian treaty—that gave meaning to the "treaty" exception of Section 1152.[26] We would be compelled to ignore the congressional assumption of 1854 that there were then, and would be in the future, treaties which reserved to Indian tribes exclusive jurisdiction over non-Indians. And we would have to yield to the contrary assumption indulged by the Congress since the mid-1880's,[27] abandoning our

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[25] The Major Crimes Act (18 U.S.C. 1153), unlike Section 1152, has no "treaty" exception. The anomaly is lessened, but not removed, if federal jurisdiction under the Major Crimes Act does not oust tribal jurisdiction over the enumerated offenses when committed by Indians. See note 19, *supra*.

[26] The same problem would have arisen whenever a treaty reserved exclusive jurisdiction to the Tribe, whether expressly or impliedly. It is far from clear that, even today, no such express treaty jurisdictional reservations survive. See Clinton, *Criminal Jurisdiction over Indian lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 531-532 (1976).

[27] We take it for granted that the Congress of 1885 would not have restricted the coverage of the Major Crimes Act to

submission because it "clashes with * * * subsequent history." Cf. *Puyallup Tribe* v. *Washington Game Dept.*, No. 76-423, decided June 23, 1977, slip op. 8. But, fortunately, we are not required to break faith entirely.

The enactment of the Indian Civil Rights Act of 1968 resolves our dilemma. That statute imposes important limitations on the exercise of tribal criminal jurisdiction *regardless of any treaty stipulations.* Most relevantly, tribal courts from that date can impose no sentence exceeding six months' imprisonment and a $500 fine. 25 U.S.C. 1302(7). This, of course, eliminates the anomaly we have just noticed: henceforth, tribal criminal jurisdiction over Indian and non-Indian alike is limited to minor offenses, and is exclusive as to both, while federal courts, by virtue of Sections 1152 and 1153, will deal with all major crimes, without regard to the race of the accused.

To be sure, there is no evidence that the Congress of 1968 was conscious of surviving treaty stipulations that brought into play the "treaty" exception of Section 1152. But that no more matters than that those who wrote the General Allotment Act of 1887 and comparable "opening-up" legislation in the following years presumably did not appreciate that they were, as a practical matter, foreclosing implementation of treaty commitments. If unintended consequences to the detriment of tribal autonomy can flow

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offenses committed *by* Indians if it had believed non-Indians committing like offenses on the same reservations were, by treaty, subject to exclusive tribal jurisdiction.

from congressional action, surely it is right to allow the reverse to happen also. If new legislation, whatever its purpose, now makes it possible partially to enforce treaty undertakings, never abrogated, it should be given that effect.

Accordingly, we believe the Indian Civil Rights Act should be deemed to suspend,[28] *pro tanto,* any existing treaty stipulation reserving exclusive—and heretofore unregulated—criminal jurisdiction to the Tribe, and to amend the "treaty" exception in Section 1152 to that extent. This retrenchment—ironically, it may be—allows promises made more than a century ago to be revived, consistently with contemporary policy.[29] And, at the same time, we can avoid doing violence to "justifiable expectations" indulged

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[28] We say "suspend" advisedly. The conclusion that a treaty stipulation in favor of the Indians has been permanently abrogated by unilateral action of the United States is to be avoided, if at all possible. See *Menominee Tribe* v. *United States, supra,* 391 U.S. at 412-413. The time may come when the Congress deems it right to lift, in part or in whole, the limitations on the sentencing powers of tribal courts and, should that happen, the treaty stipulations, still in existence, can recover more or all of their original effect. Needless to say, a Congress minded to lift such limitations would also amend or repeal the Major Crimes Act so as to avoid any conflict or incongruity.

[29] Saving by narrowing is, of course, not a novel jurisprudential technique. One need only remember that the historic power of federal courts to punish for criminal contempt was saved by limiting penalties to those available for petty offenses and that a statute enacted without thought of the problem (18 U.S.C. 1) was invoked in aid of that result. See *Muniz* v. *Hoffman,* 422 U.S. 454, 475-477, and cases there cited.

by white settlers since the 1890's. See *Rosebud Sioux Tribe* v. *Kneip, supra,* slip op. 21. Moreover, this solution eliminates almost all potential conflicts of jurisdiction, and, the *McBratney* exception aside, subjects everyone within the reservation boundaries to the same laws and the same courts for like offenses.

3. But even if, contrary to our submission, the Court is not satisfied that the Treaty of Point Elliott effectively reserves to the Tribe *exclusive* jurisdiction over the reservation, it does not follow that tribal criminal jurisdiction over non-Indians is at an end. We can honor the original understanding by construing Section 1152—at least as applied to reservations established by treaties that do not affirmatively relinquish tribal criminal jurisdiction—as *supplementing,* rather than wholly *supplanting,* tribal jurisdiction.

For this purpose, we cannot rely on the letter of the "treaty" exception, which in terms embraces only instances in which treaty stipulations reserve to the tribe "exclusive" jurisdiction. We must examine Section 1152 as a whole, applying the usual presumption, to determine if it does not confer on the United States only a jurisdiction concurrent with whatever tribal authority independently exists, where it has not been expressly surrendered.

On its face, Section 1152, when it applies federal law,[30] does not thereby oust concurrent tribal juris-

[30] By virtue of the Assimilative Crimes Act, 18 U.S.C. 13, that may of course be "borrowed" state law. But, under most circumstances, state law and the jurisdiction of state courts are excluded when Section 1152 applies. See *Williams* v. *United States,* 327 U.S. 711, 713-714 and n. 10.

diction. It is, of course, clear that the reference in the provision to "the sole and exclusive jurisdiction of the United States" is no more than a way of identifying *which* federal laws are rendered applicable. These words do not prejudice the question whether, in "Indian country," federal jurisdiction shall be exclusive or concurrent. *In re Wilson,* 140 U.S. 575, 578. Indeed, even the reference is now erroneous, since the laws intended to be invoked are presumably those which apply within the "special maritime and territorial jurisdiction of the United States," a term defined as including "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive *or concurrent* jurisdiction thereof * * *." 18 U.S.C. 7 (emphasis added).

Nor is the question foreclosed by the limited exceptions made in Section 1152. That Indians committing offenses against other Indians or their property are *wholly* beyond the reach of federal law (except for major crimes since 1885) hardly decides whether non-Indians are ever subject to concurrent tribal jurisdiction. And the same reasoning applies to the "treaty" exception; the provision exempting from federal law all persons committing offenses which a treaty reserves for *exclusive* tribal jurisdiction, does not imply that there can be no concurrent tribal jurisdiction over non-Indians.

More troublesome, to be sure, is the second exception, in effect barring reprosecution of Indians al-

ready punished by the Tribe. If concurrent tribal jurisdiction over non-Indians were contemplated, one might expect the "double jeopardy" provision to embrace that situation also. It may be that, when Section 1152 was last amended in 1854, tribal prosecution of non-Indians on reservations, then very few in number, was such a rare occurrence as not to seem a matter requiring legislative attention. We do know that the 1854 amendment which introduced the "double jeopardy" exception as a rider to a special bill dealing with the Arkansas Territory was provoked by a particular incident involving reprosecution of an Indian, and it seems likely that Congress was merely addressing the problem at hand. See 28 Cong. Globe 701 (1854).

But, at all events, it is dangerous to rest any conclusion on the asymmetry of a statute that does not always mean what it seems to be saying. We need only remind ourselves that, although Section 1152 nowhere exempts from federal jurisdiction offenses by one non-Indian against another on reservation land, this Court has consistently so held. *United States* v. *McBratney, supra*; *Draper* v. *United States, supra*; *New York ex rel. Ray* v. *Martin, supra,* and see *United States* v. *Antelope, supra,* slip op. 2 n. 2, 3 n. 4, 7 n. 9.

What is more, the same "double jeopardy" exception in Section 1152 gives a strong indication in the opposite direction. Indeed, the provision makes it plain that the federal jurisdiction conferred by Section 1152 is *not* always exclusive. Although Indians

committing offenses against non-Indians are normally subject to federal law, the statute obviously does not contemplate that this precludes such persons being "punished by the local law of the tribe." And, this being so, it would be natural to conclude that, in other situations also, Section 1152 merely creates concurrent federal jurisdiction.

This conclusion is bolstered, we believe, by the "treaty exception." As we have observed, that clause of Section 1152 *wholly* exempts cases over which, by treaty, the Tribe has retained "exclusive jurisdiction." Does this not suggest that there are other instances in which the Tribe has retained *concurrent* jurisdiction, and that, accordingly, federal laws, although applicable, will not pre-empt local laws?

At the least, it seems reasonable to read Section 1152 as never ousting tribal jurisdiction when it independently exists. In some cases, tribal authority may have been surrendered; in others, there may have been no effective tribal law or tribal courts, with the consequence that federal jurisdiction was in practice exclusive. But, in all other situations, Section 1152, we suggest, was only meant to supplement tribal authority.

4. One must concede that prevailing opinion for some time has opposed the view that the federal jurisdiction conferred by Section 1152 is only concurrent with that retained by the Tribe. But that is not an insuperable obstacle. As the majority and dissenting opinions below sufficiently show, the legislative history of the 1834 Act and the amending Act

of 1854 is too sparse, and too ambiguous, to furnish a safe guide.[31] And uncritical congressional assumptions since then do not meaningfully reveal the original understanding. See *Williams* v. *United States*, *supra*, 327 U.S. at 714-715 n. 10. Nor do the published views of the Attorney General and of the Department of the Interior. Moreover, the general assumption is demonstrably grounded on a false premise.

The simplistic view, too commonly indulged, is that Section 1152 leaves the Tribes with criminal jurisdiction only of cases in which both wrongdoer and victim are Indians. But, as we have noted, the "double jeopardy" exception makes it clear that this is not so. That erroneous starting point is enough to invalidate the conclusion stated by the Attorney General in 1834. 2 Op. Atty. Gen. at 695. What is more, that Opinion also wrongly assumes that the

[31] The meager legislative history of the amending Act of 1854 tells us only (as already noted, *supra*, p. 40) that its stimulus was the case of an Indian who, although already punished under tribal law, was prosecuted in federal court for violating the prohibition on bringing intoxicants into the reservation. This led to (1) an amendment of the 1834 Act exempting Indians from the "ardent spirits" importation penalties, (2) the addition of the "double jeopardy" exception to Section 1152, and (3) an express reaffirmation of the "treaty" exception to Section 1152, included in the Indian Intercourse Act of 1817 (3 Stat. 383), but dropped by the 1834 Act. Because the Congress of 1854 indulged different assumptions about the proper scope of tribal autonomy, the indications of congressional views in enacting the earlier statutes—ambiguous in any case—offer little guidance as to the true construction of Section 1152, the present scope of which was not settled until 1854.

Treaty with the Choctaws and all other Indian treaties affecting lands west of the Mississippi relinquished tribal jurisdiction over all but cases involving Indians only (*ibid.*), a view repudiated by a subsequent Attorney General in 1855. See 7 Op. Atty. Gen. at 177-179.

The only remaining embarrassments are the 1855 Opinion of the Attorney General, just cited, and the decision in *Ex parte Kenyon*, 14 Fed. Cas. 353 (C.C. W.D. Ark.) (No. 7,720), both of which perpetuate the error of reading the first exception in Section 1152 as stripping tribal courts of all jurisdiction except when wrongdoer and victim are both Indians. But, in both instances, the controversy was about entirely discrete matters [32] and the view given of Section 1152 as applied here is mere dictum. A more recent Department of Interior opinion embracing the same view, 77 I.D. 113, has now been withdrawn.

In these circumstances, we submit it is not too late to reinstate the true rule announced by Section 1152: that federal jurisdiction within an Indian reservation, except as to major crimes, is only supplementary to whatever independent authority tribal courts have not voluntarily surrendered.

5. Our solution, to be sure, requires some accommodations to be made. But we do not think any of the potential difficulties are insuperable. Indeed, we

[32] The Attorney General was answering a question about *civil* jurisdiction; the *Kenyon* case involved an offense committed *outside* the territorial jurisdiction of the tribal court, as this Court noted in *Elk* v. *Wilkins*, 112 U.S. 94, 108.

are told that in the State of Washington, a number of Tribes "routinely assert jurisdiction over non-Indians for offenses against their law and order codes" and that this happens "without particular problems or objections." [33]

Our primary submission—*exclusive* tribal jurisdiction for minor offenses—of course avoids potential jurisdictional conflicts. But these are, in any event, unlikely. The existence of concurrent criminal jurisdiction is not novel. On the contrary, it is a familiar fact of life in this federal republic. Moreover, while under our alternative submission, tribal and federal courts would, in theory, both have jurisdiction over *all* offenses committed by non-Indians on the reservation—except only those in exclusive state jurisdiction under the *McBratney* rule—the practice will be very different. Because of the severe limitation on the sentencing power of tribal courts, serious offenses will continue to be dealt with by federal courts, applying federal law. For the minor crimes as to which their sentencing power is adequate, it will presumably be a rare instance when federal prosecutors will not be content to leave the matter to tribal authorities—as in the present cases.

There is, accordingly, little cause for concern that multiple prosecutions—assuming no constitutional bar [34]—will result. The fear that the Tribe may

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[33] Brief of Governor of the State of Washington in Opposition, p. 8 and n. 18.

[34] See *United States* v. *Wheeler*, 545 F. 2d 1255 (C.A. 9), certiorari granted October 3, 1977, No. 76-1629.

seek to immunize its own members by prosecuting first—whatever its validity under the law as presently applied—is of course irrelevant to our submission, which concerns only the trial of non-Indians. And, since the federal authorities will normally stay their hand, there will be very few occasions for a second prosecution by tribal authorities dissatisfied with the result in federal court.

Both our submissions, it is true, encounter potential objections to subjecting non-Indian residents of the reservation to tribal law and tribal courts when they are excluded from the law-making process and its administration. In one sense, this is no different from the situation of anyone residing in a foreign country; absent special extra-territoral arrangements, he must submit himself to the law and the courts of the country which he has chosen to enter. *E.g. Wilson* v. *Girard*, 354 U.S. 524, 529. Indeed, that principle has been applied to Indian reservations in the past. See Clinton, *supra*, 17 Ariz. L. Rev. at 953-954.

On the other hand, it is arguable that white residents of Indian reservations, some of whose ancestors settled long ago at the invitation of the federal government, under the assumption that they would not be subjected to tribal law, have a strong claim. That concern has been importantly reduced by the Indian Civil Rights Act, 25 U.S.C. 1301, 1302, 1311. Nevertheless, at the end of the day, it may be that the Tribes will have to choose between narrowing the territorial jurisdiction of their laws and courts or ad-

mitting non-Indian residents to participation, at least on juries. But, as the court of appeals stated, that is a matter that need not be resolved at this stage of the litigation.[35]

Our proposed solution has positive advantages, however. It lessens the problem of determining the race of the accused, by-passing the knotty question who is an "Indian" for jurisdictional purposes. It minimizes the uncomfortable—if constitutional (see *United States* v. *Antelope*, *supra*)—disparities of treatment based on race. Henceforth—except only with respect to crimes not affecting tribal interests—all persons within the same reservation accused of minor crimes would be dealt with under the same rules. And, of course, our submission advances the important policy of tribal self-government. See Final Report of the American Indian Policy Review Commission (1977).

D. Existence And Extent Of State Jurisdiction

Thus far, in discussing the extent of federal criminal jurisdiction on Indian reservations, we have assumed that State criminal law has no application,[36] and state courts have no jurisdiction, except only in the *McBratney* situation.[37] But there *is* a claim that

[35] Equally premature are other Due Process questions relating to the *procedures* followed by tribal courts.

[36] Except as "borrowed" law under the Assimilative Crimes Act when there is no substantive federal enclave law defining the offense.

[37] We have already indicated why these cases are not governed by *McBratney* and its progeny. *Supra*, p. 16; and see note 20, *supra*.

the State of Washington has validly asserted criminal jurisdiction over the Port Madison Reservation, and, if that contention is correct, it may override all we have said about federal and tribal court competence. Accordingly, we must address the question.

1. State jurisdiction, the *McBratney* situation aside, can only be validly asserted by leave of the United States. See, *e.g.*, *Antoine* v. *Washington*, 420 U.S. 194, 205. Such permission, in turn, may be given by the Act of admission (in the case of non-original states) or by subsequent Congressional legislation. There is, however, no suggestion that the Washington Enabling Act (25 Stat. 676) authorized the state to apply its laws to Indian reservations. On the contrary, as we shall have occasion to notice in a moment (*infra*, pp. 54-55), the Act expressly reserves Indian lands and the Washington Constitution expressly disclaimed jurisdiction over such areas. Sole reliance is placed on Public Law 280 (67 Stat. 588), enacted by Congress in 1953, and we accordingly begin our examination there.

Relying on that federal statute, the State of Washington, in 1957, enacted legislation which asserted full civil and criminal jurisdiction over Indian reservations within the state, to become effective, however, only upon the consent of any affected tribe.[38] Wash.

[38] Although tribal consent has only become necessary, as a matter of federal law, since 1968 (see 25 U.S.C. 1321), Washington determined, in 1957, to condition state jurisdiction on the Tribe's acquiescence. See Wash. Laws of 1957, ch. 240, § 2 (Pet. App. B, p. 29). There is an important difference,

Laws of 1957, ch. 240. The following year, the Suquamish Tribal Council asked the state to assume full jurisdiction (Pet. App. B 30-31) and the Governor accordingly declared state "criminal and civil jurisdiction" applicable to the Port Madison Reservation on May 15, 1958 (Pet. App. B, p. 32).

Five years later, in 1963, Washington enacted a further statute assuming jurisdiction over Indian reservations where tribal consent has not been forthcoming, [illegible] exempting, except as to eight listed matters, "Indians when on their tribal lands or allotted lands" within a reservation, provided such lands are held in trust or subject to a restriction against alienation. Wash. Laws 1963, ch. 36 (Pet. App. B, pp. 32-33). Although these provisions then had no direct application to the Port Madison Reservation, they became relevant because when, in 1971, the State Governor retroceded jurisdiction over the reservation to the United States (authorized since 1968 by 25 U.S.C. 1323), he expressly excepted the jurisdiction "provided under Chapter 36, Laws of 1963." (Pet. App. B, pp. 35-36).[39] And the acceptance of retroces-

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however: the Washington statute of 1957 required only acquiescence by the tribal council, whereas federal law now requires the tribal members themselves to make the decision to submit to state jurisdiction. *Kennerly* v. *District Court of Montana*, 400 U.S. 423.

[39] Presumably, the Governor felt himself authorized, at the request of the Tribe (Pet. App. B 34), to return that jurisdiction which the State had assumed only by tribal consent, but not to override the State legislative decision to impose a limited jurisdiction, regardless of tribal acquiescence.

sion by the Secretary of the Interior recites the same exception (Pet. App. B, p. 36).

From this chronology, it is apparent that, assuming the action of the Governor in retroceding jurisdiction became effective upon federal acceptance, as the court of appeals held (we believe correctly),[40] the question of state jurisdiction in these cases turns on the Washington law of 1963. For the *Oliphant* case, where the incident occurred on tribal trust lands and does not involve any of the eight special matters, the issue would be whether the 1963 law excepts only offenses committed *by* Indians on such trust lands, or all offenses *involving* Indians. In *Belgarde*, on the other hand, the facts bring it within state jurisdiction as defined by the 1963 statute and the only question is whether that jurisdiction *pre-empted* tribal law and the competence of tribal courts, or was merely *concurrent*, as the district court held. These are difficult issues which have not been addressed by the court of appeals,[41] and which may not be appropriate for initial consideration here.

But before construing the 1963 law, it is necessary to determine its validity. The Court of Appeals for

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[40] The Washington Supreme Court has apparently also accepted the validity of this retrocession. See *Tonasket* v. *State*, 84 Wash. 2d 164, 166-167 n. 2, 525 P. 2d 744, 746, n. 2.

[41] In *Oliphant* (the only case it considered), the court of appeals simply ignored the 1963 Washington statute. That may be because the validity of this law was then under consideration by the court in the *Yakima* case, as described in the text immediately following.

the Ninth Circuit has now declared it unconstitutional. *Confederated Bands and Tribes of the Yakima Indian Nation* v. *State of Washington*, 550 F.2d 443, remanded, 552 F. 2d 1332, rehearing denied, No. 74-1225, July 1, 1977. If that decision stands, it will be unnecessary to construe Washington's 1963 law. And, although an appeal to this Court has been filed, it would seem premature to consider in these cases State law issues which may become moot by dismissal of the appeal or affirmance of the judgment in *Yakima*. Nor do we think it appropriate to discuss here the constitutional question which this Court has not yet agreed to review in the case where it is directly presented.

There are, moreover, independent non-constitutional grounds for questioning the validity of the Washington statute of 1963—one of which also applies to the 1957 statute. These depend on the construction of Public Law 280, which, it may be, did not authorize the State of Washington to assume jurisdiction when and how it purported to do. The same prudential considerations probably argue against deciding these issues here. But we outline them briefly because, unlike the questions peculiar to the Washington law of 1963, they have been decided by the court of appeals, albeit in other cases, and they have continuing importance for Indian law in other states.

2. Public Law 280 ceded to certain listed states full criminal jurisdiction over "Indian country" within the state's boundaries, to the exclusion of federal jurisdiction, effective immediately and without any requirement of action by the state or by the affected Tribes. 18 U.S.C. 1162. Neither as originally enacted, nor as later amended (68 Stat. 795; 72 Stat. 545; 84 Stat. 1358), did this "automatic" jurisdiction provision apply to the State of Washington. Nevertheless, the terms of that portion of Public Law 280 may be relevant in construing the "optional" jurisdiction provisions which are now invoked. We particularly note that, where "automatic" jurisdiction is ceded over "offenses committed by or against Indians," it is to be exercised "to the *same extent* that such State * * * has jurisdiction over offenses committed elsewhere within the State * * *"; that "the criminal laws of such State * * * shall have the *same force and effect* within such Indian country as they have elsewhere within the State * * *" (18 U.S.C. 1162(a)); and that the special federal criminal jurisdiction provisions (18 U.S.C. 1152), including the Major Crimes Act (18 U.S.C. 1153), are henceforth inapplicable (18 U.S.C. 1162(c)).

With this preamble, we examine the provisions of Public Law 280 which are directly applicable, Sections 6 and 7. These sections authorized any unlisted state, without tribal consent and "[n]otwithstanding the provisions of any Enabling Act for the admission of a State," to "amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption

of civil and criminal jurisdiction in accordance with the provisions of this Act" and, thereafter, "to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." Section 6 (now codified as 25 U.S.C. 1324) states that "the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."

3. Two threshold questions are raised by these sections. The first is whether a state was free to assume less than full criminal jurisdiction. Under those provisions, a state could assume both criminal and civil jurisdiction, or one or the other. But was it authorized to exercise a partial, or limited, jurisdiction, whether for civil or criminal cases?

It is at least arguable that the phrase "in accordance with the provisions of this Act," without more,[42] incorporates by reference the requirement in the "automatic" jurisdiction section that criminal jurisdiction, if assumed at all, must be "to the same extent" and with "the same force and effect" as elsewhere in the state—which is to say, full jurisdiction over all criminal matters normally within state competence,

[42] It is otherwise since the 1968 amendment (25 U.S.C. 1321(c)), which expressly permits partial assumptions of jurisdiction by mutual consent of the State and the affected Tribe.

to the exclusion of federal criminal law."[43] That would seem the natural meaning and it fits with the legislative concern to end the "hiatus in law-enforcement authority" created by limited federal authority and often non-existent or not functioning tribal mechanisms. See H. R. Rep. No. 848, 83d Cong., 1st Sess. 5-6 (1953), quoted in *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 379-380.

A majority of the Court of Appeals for the Ninth Circuit, in its *en banc* decision in the *Yakima* case, has concluded otherwise. See *Confederated Bands and Tribes of the Yakima Indian Nation* v. *State of Washington*, 552 F. 2d 1332. But we think the dissent in that case more persuasive. In our view, the majority dismisses too quickly the indications that the 1968 amendment to Public Law 280, henceforth permitting partial state assumptions of jurisdiction with tribal consent (25 U.S.C. 1321(a); cf. *Kennerly* v. *District Court of Montana*, *supra*, 400 U.S. at 429-430 and n. 6), was viewed as a change. See 550 F. 2d at 447 n. 10; compare 550 F. 2d at 455-456 and n. 20. And the court overlooked that any current arrangement for divided jurisdiction established before 1968 which serves the interests of the affected Tribe can now be ratified by both the Tribe and the State,[44] consistently with present congressional policy

[43] See 18 U.S.C. 1162(c), making Sections 1152 and 1153 inapplicable to "automatic" jurisdiction states.

[44] To be sure, congressionally mandated procedures must be followed: the tribe must express its consent by referendum and the State must pass legislation. *Kennerly* v. *District Court*

to condition any such arrangement on mutual consent.

4. The other question, equally unnoticed in the proceedings below, is whether the State of Washington has complied with the prerequisite to assuming jurisdiction of "appropriately amend[ing] [its] State constitution" "where necessary." Washington did not amend its Constitution and it is not obvious why this omission is not fatal to its assertion of criminal jurisdiction. See *McClanahan* v. *Arizona State Tax Comm'n, supra,* 411 U.S. at 177-178; *Clinton, supra,* 18 Ariz L. Rev. at 566 n. 339. Indeed, the relevant provision of the Washington State Constitution, Art. XXVI, par. Second (R.C.W.A. 1966), expressly disclaims "all right and title" to "all lands * * * owned or held by any Indian or Indian tribes," which "shall remain under the absolute jurisdiction and control of the Congress of the United States." This territorial description includes the *whole* of the Port Madison Reservation, whoever the patentee. See 18 U.S.C. 1151; *Seymour* v. *Superintendent, supra,* 368 U.S. at 358. The only issue is as to the scope of the words "absolute jurisdiction and control."

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of Montana, supra, 400 U.S. at 427-429. So, also, if the State involved is one of those (like Washington) that must amend its constitution under Section 6 of Public Law 280 (now 25 U.S.C. 1324), this prerequisite to assuming jurisdiction, if not already satisfied, must be complied with. See below, pp. 54-58. But, since 1968, there is no restriction on mutually agreed arrangements for divided or concurrent jurisdiction, temporary or permanent. *Id.* at 430 and n. 6.

It is difficult to read those words as not leaving "Indian country" as free from state law as it was before statehood. Certainly, the construction of similar language in the Alaska Statehood Act, premised on the unique situation of the natives there, past history, and particularized legislative history, does not clearly control the question. See *Kake Village* v. *Egan,* 369 U.S. 60. But even if "absolute" does not necessarily mean "exclusive," *id.* at 68, the explicit recognition that the federal Congress retained " 'absolute jurisdiction and control' " over Indian country must mean that federal criminal laws would continue to apply there, at least concurrently. Yet, since assumption of jurisdiction under Public Law 280 makes the only significant federal criminal jurisdictional statutes (18 U.S.C. 1152 and 1153) inapplicable,[45] it would seem to follow that the state could not assert criminal jurisdiction exclusive of federal jurisdiction without amending its constitutional provision.

To be sure, that question has been decided by the Washington Courts and by the Court of Appeals for the Ninth Circuit so as not to require a state constitutional amendment before the state could validly exercise jurisdiction, civil or criminal, pursuant to Public Law 280. See *Makah Indian Tribe* v. *State,* 76 Wash. 2d 485, 457 P. 2d 590, appeal

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[45] We indulge the prevailing assumption that the exclusion of federal jurisdiction under Sections 1152 and 1153, in terms effective as to listed states where "automatic" jurisdiction was ceded by Public Law 280 (18 U.S.C. 1162(c)), is likewise effective as to "optional" states, at least *pro tanto.* See *supra,* pp. 51-53.

dismissed, 397 U.S. 316;[46] *Quinault Tribe of Indians* v. *Gallagher*, 368 F. 2d 648, certiorari denied, 387 U.S. 907. And, more recently, in the *Tonasket* case, after the question had been suggested in this Court and the case was remanded, 411 U.S. 451, the Washington Supreme Court adhered to that ruling. *Tonasket* v. *State*, 84 Wash. 2d 164, 525 P. 2d 744. But, although this Court dismissed an appeal from that judgment, 420 U.S. 915, the question would appear to remain open here.[47]

In our view, the argument against valid assumption of state jurisdiction is substantial. We do not elaborate it here, but note only three points. First, the Washington Court's reliance in *Tonasket* on *Kake Village* v. *Egan*, 369 U.S. 60, seems to us largely misplaced, since this Court was not there relying on Public Law 280 as ceding jurisdiction to Alaska, and was dealing with non-reservation Indians. See *McClanahan*, *supra*, 411 U.S. at 176 n. 15. Second, *Tonasket* aside, the state and federal court decisions antedate *Kennerly* v. *District Court*

[46] The question suggested here was not presented by the Jurisdictional Statement in that case. See No. 922, O. T. 1969.

[47] While the Jurisdictional Statement in that case did present the issue, this Court may have concluded that the question was not "substantial" because of intervening State legislation (mentioned in the remand order, 411 U.S. 451) which exempted from taxation any sale of two cartons of cigarettes even to a non-Indian. See *Tonasket* v. *State*, *supra*, 84 Wash. 2d at 182-183, 525 P. 2d at 755. Indeed, the United States had suggested as much before the remand of this Court. See Brief for the United States as Amicus Curiae in No. 71-1031, pp. 17-19.

of Montana, 400 U.S. 423, which stressed, on an analogous issue, that exact compliance with the procedures required by Public Law 280 is essential before state jurisdiction attaches. Finally, the legislative history of Public Law 280 shows that Congress believed the State of Washington, together with 7 other states for whose benefit Section 6 was written, would have to amend its Constitution before it could assume jurisdiction over Indian reservations. See 99 Cong. Rec. 10782 (1953); Hearings on H. R. 1063, jointly before the House Subcommittee on Indian Affairs, and the House Committee on Interior and Indian Affairs, 83d Cong. 1st Sess. (1953) (unpublished).[48]

Ordinarily it would be for the state courts finally to construe the State Constitution. But one may doubt if this is so when the question is whether the state has complied with a federally-imposed condition to a cession of jurisdiction over an Indian reservation, and the condition is premised on a Congressional reading of the State Constitution provision which was, in fact, a literal transposition of words written by Congress in the Washington Enabling Act. Cf. *Kennerly*, *supra*. If, then, the question is one of federal law,

[48] A transcript of these hearings was submitted to the Court by the United States in the *Tonasket* case (No. 71-1031) and was before the Court in *Bryan* v. *Itasca County* (No. 75-5027). See 426 U.S. at 383 n. 9. The most pertinent passages of these hearings are reproduced in the opinion of the dissenting Justices of the Washington Supreme Court in *Tonasket* v. *State*, *supra*, 84 Wash. 2d at 186-192, 525 P. 2d at 758-761.

to be judged by federal standards, we believe it probable that it would be resolved against the state.

5. If the state constitutional amendment question we have just alluded to were deemed open and were decided against the state, that would be the end of any claim of state criminal jurisdiction in these cases. Resolution of that question the other way, however, would require further consideration of the several state actions purporting to extend criminal jurisdiction, and later retroceding at least some part of it.

So, also, a ruling that, under Public Law 280—until the 1968 amendment—an "optional" state (like Washington) must extend all its criminal laws to a reservation, or none, would effectively end the claim of state jurisdiction in both the present cases. This is so because the limited assertion by the State of Washington of jurisdiction in 1963 would be invalid and the retrocession of 1971 must then be read as complete, treating the exemption for the 1963 Act as not written.

In these circumstances, one is tempted to invite the Court now to decide one or both of the broader questions under Public Law 280, just discussed. These issues, affecting jurisdiction over Indian country well beyond the boundaries of the State of Washington,[49] ought to be definitely resolved by this

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[49] However, a ruling here upholding either objection to assertion of state jurisdiction will have no serious disruptive effect. Of the eight States where Congress believed a constitutional amendment was required, to date Washington is the only state that has purported to assume general, nonconsensual jurisdiction over Indian country. And, as we have already said, existing arrangements for divided jurisdiction over reservations in other States can be ratified by mutual agreement.

Court. Although they were not addressed by the Court of Appeals for the Ninth Circuit in these cases, that court has expressed its considered view on the two questions in other cases and no purpose would be served by requiring the court of appeals to face them anew. Yet, because of our posture as an *amicus* in these cases, we hesitate to inject new questions at this stage.

Accordingly, we suggest the following course:

(1) that the Court defer argument in the present cases until it determines whether to grant plenary review in the *Yakima* case; (2) if the appeal in *Yakima* is dismissed, or the judgment is summarily affirmed, all state jurisdictional claims in these cases having been effectively eliminated, the Court could then decide these cases by reaching only the question whether subsisting federal jurisdiction ousts tribal court competence (see Parts A, B and C, *supra*), and the minor (and in our view clear) question of the validity of the State Governor's 1971 retrocession; (3) if the Court determines to hear the *Yakima* appeal, where the arguments we have outlined above will be open to the appellees in defending the judgment, the Court might appropriately set the present cases for oral argument at the same time.

CONCLUSION

Subject to resolution of the state jurisdiction claim in these cases or in *Yakima*, as just discussed, the United States urges affirmance of the judgments in both the present cases.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE COLORADO INDIAN TRIBES, GILA RIVER INDIAN COMMUNITY AND SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

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CONSENT TO FILE BRIEF AMICI CURIAE

COME NOW the Colorado Indian Tribes, the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community and inform the Court that pursuant to Rule 42, Supreme Court Rules, the written consent of all of the parties to this case have been presented to this Court at the same time as this brief has been filed.

I.

INTEREST OF AMICI CURIAE

The Colorado River Indian Tribes, the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community are participating as amici curiae because of the substantial impact that a reversal or modification of the decisions below would have upon these Indian Tribes and their people. Each of these three Indian Tribes participating as amici curiae recognizes and asserts that the internal structure and external contact of each are different one from another, and the situation of each is significantly different from that of the Suquamish Indian Tribe. Their interests as amici curiae depend on the composition of each individual Tribe and its contact with the communities around its Reservation.

A. THE INTEREST OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

The Salt River Pima-Maricopa Indian Community is composed of Indian people who have lived in the Salt River Valley for well over 2,000 years. They trace their ancestry to the Hohokam Indians who constructed a system of irrigation canals that has been traced back to 300 B.C. In 1879 the United States set aside a Reservation for the Salt River Pima-Maricopa Indians.

The Salt River Reservation is located within the Phoenix Scottsdale metropolitan area. On the west and north is the City of Scottsdale with a population of 80,000. The Cities of Mesa and Tempe, with a combined population of 216,900, are on the southern boundary of the Salt River Pima-Maricopa Indian Community. The City of Phoenix, with a population of 679,700, lies to the west of the Reservation, 1½

miles from its boundary, beyond Scottsdale. Pima Road forms the western boundary of the Salt River Reservation and sub-division housing extends to the edge of the Scottsdale side of that road for most of the length of the Reservation's western boundary.

Major places of employment and centers of commerce daily attract residents of Mesa and Tempe across the roads that traverse the Reservation into Scottsdale and Phoenix. Attractive resorts and the cool mountains of north central Arizona are reached for many in Scottsdale and Phoenix by traveling roads through the Reservation.

The Verde River runs through the eastern part of the Reservation and its running waters and picnic grounds bring thousands from Phoenix and Scottsdale each week during the hot desert summers.

Scottsdale Community College is located just within the Reservation near its western boundary. Five thousand students attend the facility. All but one hundred and fifty are non-Indians from the neighboring Cities.

Large sand and gravel operations, located along the Reservation's southern boundary, truck their product through the Reservation to Scottsdale, Phoenix, Mesa and Tempe.

The Pima and Maricopa Indians of the Salt River Pima-Maricopa Indian Community have since 1940 governed themselves under the Indian Reorganization Act of 1934. Act of June 18, 1934, 48 Stat. 984. With little help from their trustee, they have attempted to secure for themselves the prosperity, dignity and safety that was theirs before the coming of the non-Indian. The 3,000 Indians living on the Reservation are subject to the daily pressure of the majority culture surrounding them. They have determined to govern themselves and have kept the non-Indian population to a transitory minimum.

Approximately one-half of the arable land within the Reservation is under cultivation. More than fifty percent of the cultivated land is farmed by members of the Salt River Pima-Maricopa Indian Community, with the balance leased to non-Indians by allotted land owners. Community plans call for farming operations on the balance of the arable land when the water rights of the Salt River Community are finally favorably resolved. Attempts to subdivide the land and build housing for non-Indians have been steadfastly opposed by the Indians, even in the face of significant monetary temptation. Except for some small fractionated interests acquired by inheritance from Indian spouses, no non-Indian owns any fee interest in land within the Reservation.

While it has never been possible for the Indians of the Salt River Community to ignore the non-Indian population on all of its sides, the exponential rate of non-Indian migration to the Salt River Valley has increased the problems such population brings to the predominately rural Salt River Community.

The lands of the Salt River Community have been viewed by many of the people of the neighboring Cities as a place to dump refuse, speed from one city to another, and in recent years, use marijuana and narcotics beyond the control of City or County police. In 1972, after a number of Indian children were almost run down by speeding motorists while they were awaiting their school bus, and after the Indian population became distraught over the desecration of the lands of their Reservation by motorcycles and other off-the-road vehicles, the Salt River Pima-Maricopa Indian Community Council enacted the first Community ordinances which included non-Indians within the scope of Community criminal jurisdiction. This was followed two years later by

the amendment of the Community Criminal code making the Code applicable to all persons. Prior to this reform, the Community's "Law and Order Code" defined crimes in each instance by race or ancestry: "Any Indian who shall attempt or threaten bodily harm to another person through unlawful force or violence shall be deemed guilty of assault. . . ." Within their own borders, the Salt River Indians had been unable to protect their people, their property and their land from assault from the criminal elements of an ever expanding non-Indian population.

Perhaps the insult to the dignity of these people was as great as the insult by criminal activity to their persons and property. As they determined to control all criminality within their borders, both Indian and non-Indian alike, they determined to develop a system of criminal justice that would meet the highest possible standards. The Indian judges have regularly attended training sessions provided by the National American Indian Court Judges Association and held at the Arizona State University Law School. Indian police employed by the Community have attended the Police Academies of both the Federal and local governments. All of the electronic and scientific equipment used by the Police Departments of comparably sized communities are employed by the Salt River Police Department. The Salt River Pima-Maricopa Indian Community has shared with its neighboring communities in the grants of the Law Enforcement Assistance Administration. With these grants the Salt River Community has built, through its own Community-owned construction company, the most modern police station and jail in the Salt River Valley, as well as a modern court facility.

During the year 1976, 396 non-Indians went through the

Salt River Police and Court systems. Of that number, 33 were charged with drug offenses; 325 were charged with various traffic offenses including 45 charged with driving under the influence of drugs or alcohol, and the remainder were charged with other minor criminal offenses.

Before criminal jurisdiction was assumed over non-Indians, the Salt River Community was at the administrative mercy of the County Sheriff's police. Covering a large land area the elected County Sheriff had his forces thinly spread and often was unable or unwilling to involve himself within the Indian Reservation. The failure of the Sheriff to control traffic within the Reservation was the direct cause of the assumption of jurisdiction. The Federal Bureau of Investigation, with a small staff, was unable to react to the growing problems on the Reservation. The United States Attorney was always reluctant to bring before the United States District Court cases involving relatively minor offenses in the face of the Court's ever increasing caseload.

The Salt River Indians did what they had to do. They expanded their system of criminal justice so that it would encompass all who would transgress it. They expanded their system of criminal justice to safeguard their lives, their honor and their property. Not to do this would have meant their absorption into the surrounding Community, or the creation of a no-man's land of criminal activity.

B. THE INTEREST OF THE GILA RIVER INDIAN COMMUNITY

The Gila River Indian Reservation encompasses approximately 372,000 acres and is located in the south central Arizona counties of Pinal and Maricopa. The City of Phoenix is adjacent to the northwest part of the Reservation and lies

32 miles north of Sacaton, the seat of the government of the Gila River Indian Community.

The Community is inhabited by two Indian Tribes, the Pimas and Maricopas, with a total population of approximately 7,000. The Pimas have lived in the same geographical area for over two thousand years. No more than 300 non-Indians live within the external boundaries of the Reservation. Most of them are employees of the Bureau of Indian Affairs or the Indian Health Service.

The Gila River Indian Reservation straddles the main interstate highway which links Phoenix and Tucson, two of the nation's most dramatic metropolitan growth areas. Population growth has reached the Reservation boundaries on the northwest and has changed the old isolation of the Gila River Indian Reservation.

Large numbers of non-Indians cross the Reservation, work on its farms, and industrial plants, and visit its recreational areas.

The Pima and Maricopa Indians of the Gila River Indian Community have since time immemorial maintained a system of self-government. In more recent times, the Pimas and Maricopas of the Gila River Reservation have organized and incorporated as the Gila River Indian Community pursuant to the Indian Reorganization Act of 1934. Act of June 18, 1934, 48 Stat. 984. The Constitution and By-Laws were revised in 1960 and subsequently approved by the Secretary of the Interior. This Constitution enables the Community to enact ordinances which apply to Indians and non-Indians alike.

As a consequence of the close proximity to the large urban non-Indian populations, there has been an increase

of such violent crimes as assault and robbery. Such criminal activity is particularly directed at the elderly and their Social Security and rent payment checks. The prevention of such violent crimes requires law enforcement in and by the Community whose people have been placed in such jeopardy.

With increased urban growth and traffic have come the destruction and theft of natural resources. Mesquite wood, cactus and other native plants are negligently or purposely destroyed by non-Indian visitors. The Gila River Indian Community has enacted ordinances which make such activity punishable, regardless of whether the offender is Indian or non-Indian.

Trespass by persons who race motorcycles and recklessly drive dune buggies and other vehicles has resulted in vigorous enforcement of Community ordinances, which make such activity unlawful.

The flow of traffic inherent to the location of the Reservation places the requirement upon the Community to preserve order within the Community. If the Gila River Indian Community Police were restricted to regulating "Indian automobiles," traffic control would break down within the Community.

The Gila River Indian Community presently exercises jurisdiction over non-Indians who have violated the provisions of the Tribal Criminal Code. Since assuming jurisdiction over non-Indians approximately 1565 non-Indians have been processed through the Gila River Indian Community Court. All persons coming before the Court are subject to the same laws and accorded equal treatment. In any event, the Court does not have unfettered discretion and conducts itself in conformity with the Indian Civil Rights Act of 1968.

82 Stat. 77, 25 U.S.C. 1301, *et seq.* The Act affords protection in regard to the individual rights of all persons who are summoned before the Gila River Indian Community Court.

The Gila River Indian Community Court provides a quality of justice equal to any other Court in the State of Arizona of similar subject matter jurisdiction. Professional attorneys appear regularly in the Court. The proceedings are recorded and can be transcribed as the need arises. The Judges regularly attend training sessions and seminars offered by Arizona State University, the National American Indian Court Judges Association, and the State Justices of the Peace Association.

The Law Enforcement Assistance Administration has provided funds for the drafting of a revised Criminal Code and for the services of a professional prosecutor and staff. With Comprehensive Employment and Training Assistance and American Indian Lawyer Training Program funds, the Gila River Indian Community has hired para-professionals for work in the Court system.

The Community Police are as well trained and qualified as any other group of law enforcement officers in the State of Arizona. Every Officer is sent to a police academy for a 12-week course maintained by the Bureau of Indian Affairs. In-service training sessions are held periodically. All of the Community Police officers are cross deputized by both the Maricopa and the Pinal County Sheriff's Office. Community Police Officers hold federal commissions and qualify for commissions from the Arizona Department of Public Safety. Competent law enforcement personnel deal with criminal and traffic violation activity on the Gila River Indian Reservation.

The Pima and Maricopa people of the Gila River Indian

Community have historically been an agricultural people. Using their limited water resources, they have developed a substantial Tribal farm. In addition, Indian landowners have leased land to non-Indians for farming purposes. The Community had developed three industrial parks all of which have active industries located on them. Major recreation areas have been developed to the southeast of Phoenix, and a museum, arts and crafts center and restaurant lies off the main interstate highway near Sacaton. These activities constitute the on-going effort of the Gila River Indian Community to develop an economic base for the people of the Community. The economic development of the Community attracts people to the Community and requires that law and order be maintained by the Community.

The criminal ordinances of the Gila River Indian Community which apply to all persons within the territory of the Gila River Indian Reservation, recognize the basic understanding of the people of the Gila River Indian Community that all persons within the external boundaries of the Reservation ought to be dealt with by the same standard of law and protected by the same principles of justice. Within the cloak of the Indian Civil Rights Act of 1968 and the Constitution of the Gila River Indian Community, the ordinances of the Gila River Indian Community are designed to accord such fair and equal treatment to all people.

C. THE INTEREST OF THE COLORADO RIVER INDIAN RESERVATION

The Colorado River Indian Reservation is located in the lower Colorado River Basin, straddling the Colorado River, primarily in Arizona with a smaller portion of the Reservation in California. The Reservation was established by Act of

Congress (Act of March 3, 1865, 13 Stat. 541) and subsequently expanded by Executive Orders of November 22, 1873, November 16, 1874, and May 15, 1876. The Indian population of the Reservation numbers approximately 1800. Tribal members are of Mohave, Chemehuevi, Hopi and Navajo ancestry.

The bulk of the Reservation lands are devoted to agriculture and related uses. Some of the lands are farmed by a Tribal enterprise and Tribal members, with the balance leased to non-Indian farmers. The farming operations cause large, seasonal fluctuations in the farm worker population, most of the employees being non-Indian, migrant workers. The farm workers are either transported into the Reservation by the lessees during harvest season, or independently enter and leave the Reservation as the need for help arises and diminishes with the seasons.

The Colorado River, running through the Reservation, comprises a major tourist and recreation area. Fishing, boating and camping attract visitors primarily from California, and to a lesser extent, Arizona. Substantial numbers of visitors enter the recreational areas on and near the Reservation during the hot summer weekends. Weekend tourist population may exceed 20,000. The fluctuations in visitor population brings with it the usual increase in criminal activity.

Located entirely within the exterior boundaries of the Reservation is the Community of Parker with a non-Indian population of 2,000 residents. While approximately one-third of the lots within the Community are Tribally owned, the remainder are owned in fee by residents. Parker is located on the main highway within the Reservation and travel

to and from the Community and the recreation areas to the north, on and off the Reservation, proceeds across the Reservation. Substantial traffic exists between major agricultural areas in the middle and southern portions of the Reservation and Parker. Substantial traffic proceeds both in north-south and east-west directions through the Reservation.

The Colorado River Indian Tribes have been a federally recognized Tribe, and duly organized pursuant to the Indian Reorganization Act of 1934 since 1937 when its Constitution was first adopted. In 1940, it adopted its Law and Order Code, which has undergone extensive revision as late as June 1974. Under the terms of the Tribal Law and Order Code jurisdiction exists over all persons and all matters of a civil and criminal nature within the limits of the Tribal Courts, subject matter jurisdiction.

The Tribal Court has exerted jurisdiction over all individuals, Indian and non-Indian alike, since the enactment of the amended Code. Since that time, the Tribal Court has heard 6027 criminal and traffic cases. Of the total cases heard, 1794 have involved non-Indians. The Tribal traffic ordinances are in most particulars identical to the Arizona traffic code. Despite the substantial non-Indian contact with Tribal Court, there have been no petitions filed for Writs of Habeas Corpus under the Indian Civil Rights Act of 1968.

The proper functioning of the Tribal Law Enforcement system, including the Courts and Police, is principally attributable to the training provided Tribal Judges by the National American Indian Court Judges Association and the training and sophisticated equipment provided Tribal Police Officers. Both Court facilities and the jails were constructed in 1974. The jail is used to hold federal prisoners and

provides facilities superior to those of many County and local institutions. The Tribal Court maintains an independent juvenile court, with access to Community and federally funded programs for all juvenile offenders. Providing support for the Tribal judicial system is a current Law and Order Code, paralleling to a large extent the Arizona statutes. The code establishes the Tribal Court and specifies Court procedures in such matters as juries, arrest, search and seizure, presentence confinement, bail, judgment and sentencing in criminal cases, double jeopardy and speedy trial. Substantive offenses are comprehensively detailed as well. Non-Indians as well as Indians are incarcerated and are released on their own recognizance as appropriate, in accordance with uniform and usual practices.

Tribal jurisdiction has been exercised over non-Indians as a result of the necessity of the Tribe to preserve law and order within the exterior boundaries of the Reservation. Matters referred to the United States Attorneys Office, particularly if not one of the major crimes, were often held for lengthy periods of time and quite often resulted in no action at all. The press of other more important cases seemed to take precedence over the problems of law and order within the Colorado River Reservation. The County Sheriff and other law enforcement authorities have often not been able to adequately respond to non-Indian incidents within the external boundaries of the Reservation.

A Law and Order Code applicable to Indians and non-Indians alike was enacted to protect the persons and property of all people within the external boundaries of the Reservation. A unitary system of justice dealing with all individuals who transgress the law within the Reservation was determined by the people of the Colorado River Indian

Tribes to be the soundest and most efficient means to accomplish those goals. That system of law, order and justice has been and can continue to be performed with appropriate responsibility for the protection of all people within the external boundaries of the Reservation.

II.

SUMMARY OF ARGUMENT

Indian tribes are governmental units with attributes of sovereignty. As such, they may exercise subject-matter jurisdiction unless such jurisdiction has been terminated by Congress.

There has been no express or implied termination of Tribal criminal jurisdiction over non-Indians who commit crimes within the external boundaries of Indian reservations. The policy of the Indian Reorganization Act supports the view that such criminal jurisdiction does exist and must be allowed to be asserted.

III.

ARGUMENT

THE INDIAN REORGANIZATION ACT OF 1934 MANIFESTS A POLICY OF TRIBAL SOVEREIGNTY AND SELF-GOVERNMENT WHICH MUST FIND EXPRESSION IN THE ASSERTION OF CRIMINAL JURISDICTION OVER NON-INDIANS.

An Indian tribe is not merely an association of citizens. In *United States v. Mazurie*, 419 U.S. 544 (1975), this Court held that tribes are units of government, with attributes of sovereignty:

> "They are a 'separate people' possessing 'the power of regulating their internal and social relations. . . .' *United States v. Kagama*, 118 U.S. 375, 318-382 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)."

419 U.S. at 557.

Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832), established the principle that tribal subject-matter jurisdiction exists unless it has been terminated by an Act of Congress. With respect to criminal jurisdiction over non-Indians, there has been no express termination. Amici submit that there has been no implied termination of criminal jurisdiction over non-Indians.[1]

The three amici Indian tribes are organized under the Indian Reorganization Act of 1934, 48 Stat. 984, *et seq.* The tribes contend that the policy and existence of the Indian Reorganization Act support the conclusion that Indian Tribes have the right to assert criminal jurisdiction over non-Indians who commit criminal acts while within the external boundaries of a Reservation.

48 Stat. 987 reads as follows:

> "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a

[1]The opinion below of the Ninth Circuit Court of Appeals, reported as *Oliphant v. Schlie* at 544 F.2d 1007 (9th Cir. 1976), discussed termination by implication of three statutes: 18 U.S.C. § 1152 (which extends federal criminal jurisdiction into "Indian country"); 25 U.S.C. § 1302 (the Indian Civil Rights Act of 1968); and 25 U.S.C. § 1321 (Public Law 280, permitting a state to exercise criminal jurisdiction in Indian country with consent of the affected tribe.)

These amici have nothing to add to the arguments which have been made concerning termination by implication. Rather amici wish only to discuss criminal jurisdiction in the context of the Indian Reorganization Act.

majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress."

The purpose of the Act was to restore integrity to the process of Indian self-government. It could not be seriously argued that Indian tribes were to be encouraged to adopt constitutions and by-laws which were of no effect; if Indian tribes were to reestablish themselves as sovereign entities, they must have been intended to assert their sovereignty in the fullest traditional sense. The Act would be a charade if either less were intended, or less were allowed.

The construction of the Act by this Court reflects this same perception of the Act and its purpose. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973), the

Court said:

> "Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe."

A similar view was espoused in *Fisher v. District Court of 16th Judicial District of Montana*, 424 U.S. 382 at 387, *reh. denied*, 425 U.S. 926 (1976), where the Act was described as "a statute specifically intended to encourage Indian tribes to revitalize their self-government."

To permit Indian tribes to assert their criminal jurisdiction—a jurisdiction which would reflect and follow the same constitutional safeguards required to be observed off the reservation—over non-Indians, would not be contrary to any federal policy: there has been no suggestion that the criminal activities which form the basis of the tribes' criminal jurisdiction would not be crimes off the reservation. Quite the opposite would be true. The assertion of criminal Jurisdiction would promote federal policy with regard to Indian sovereignty and self-government, as that policy is manifested in the Indian Reorganization Act of 1934.

IV.

CONCLUSION

The decisions below preserve for Indian Tribes their ability to sustain viable self-government through legal systems which apply to all people within the territorial jurisdiction of the Tribes. Justice and the practical affairs of men require

an equal system of justice within any territorial jurisdiction. The future of Indian self-government requires that the decision of the Ninth Circuit be affirmed.

We respectfully submit that the Ninth Circuit decision should be affirmed.

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In the Supreme Court of the United States

October Term, 1976

No. 76-5729

Mark David Oliphant and Daniel B. Belgarde,
Petitioners,

v.

The Suquamish Indian Tribe, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Ute Indian Tribe of the Uintah and Ouray Reservation, As Amicus Curiae

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Brief for the Ute Indian Tribe of the Uintah and Ouray Reservation, As Amicus Curiae

Pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States, this brief is filed pursuant to consent of the parties evidenced by letters of consent previously filed with the Clerk of this Court.

Interest of Amicus Curiae

Amicus Curiae the Ute Indian Tribe of the Uintah and Ouray Reservation (herein referred to as the "Ute Tribe") is a federally recognized, self-governing American Indian Tribe organized pursuant to federal law and located on the Uintah and Ouray Reservation in north-eastern Utah.

Pursuant to authority granted by its Tribal Constitution (see 25 U.S.C. §476), the Ute Tribe has adopted a Law and Order Code which asserts jurisdiction in its Tribal Courts for all civil and criminal matters occurring within the exterior boundaries of the Tribe's Reservation whenever the action involves,

> "either the Tribe, its officers, agents, employees, property, or enterprises, or a member of the Tribe, or a member of a federally recognized tribe, . . . if the matter is . . . one in which the rights of the Tribe or its members may be directly or indirectly affected (Ute Law and Order Code, §1-2-5, adopted April 11, 1975; effective date, September 15, 1975).

Such jurisdiction has been challenged generally by the State of Utah in a lawsuit now pending before the Utah Federal District Court. Such jurisdiction, insofar as it extends to non-Indians in criminal cases, has been specifically challenged by two non-Indians arrested by the Ute Tribe for trespassing on Tribal trust lands during the Fall 1976 deer hunting season. These non-Indians have filed a petition for federal habeas corpus relief from Tribal Court jurisdiction in

the same Utah Federal District Court, which petition is now pending action by the Court. The issue of civil jurisdiction by the Ute Tribe over non-Indians was an underlying issue in the case of *Brough v. Appawora*, 553 P.2d 934 (Utah S.Ct. 1976), recently vacated and remanded by order of this Court. See *Appawora v. Brough*, ... U.S. ..... (52 L.Ed.2d 384), dated May 2, 1977.

The Ute Tribe has an immediate and fundamental concern for the issues raised herein. This brief is submitted in support of the position taken by the appellee Suquamish Indian Tribe.

SUMMARY OF ARGUMENT

The Ute Tribe believes that the majority opinion of the Court of Appeals below has properly analyzed the issues presented herein and has reached the correct decision in affirming the jurisdiction of the respondent Indian tribe over non-Indians for criminal conduct, occurring on an Indian reservation, which affects the governmental interests of the tribe and the peace and safety of its members. Such conclusion is correct both as to offenses occurring on tribal ("trust") lands as well as on non-Indian roads and rights-of-way running through the reservation.

The Ute Tribe believes that the doctrine of inherent, residual tribal sovereignty provides the appropriate analytical context for deciding this case. No federal laws can be found which expressly remove jurisdiction over non-Indians from the realm of tribal sovereignty, and

established constructional canons relating to Indian legislation should be applied to prevent the speculative or inferential expansion of federal criminal laws dealing with Indian reservations. Tribal jurisdiction over non-Indians has remained dormant as the result of administrative suppression, not its non-existence. Such jurisdiction has not been lost by past non-user. Its exercise under conditions prevailing on most reservations has become a practical necessity.

Amicus curiae, The Ute Tribe, submits that the recent cases of this Court provide a workable test to be applied in delineating the extent of Indian tribal criminal jurisdiction over non-Indians. That test, in the nature of a "minimum contacts" analysis, would permit Indian tribes to exercise criminal jurisdiction over non-Indians "insofar as concerns their transactions [and conduct] on a reservation with Indians [and recognized tribal interests, such as the peace, health, safety and welfare of Indian communities]." Such test is found in this Court's characterization of the rule of ***Williams v. Lee***, 358 U.S. 217 (1959), contained in the case of ***United States v. Mazurie***, 419 U.S. 544, 558 (1975).

Argument

I

THIS COURT HAS RECOGNIZED THAT TRIBAL COURT JURISDICTION CAN PROPERLY EXTEND TO NON-INDIANS IN RELATION TO THEIR CONDUCT ON AN INDIAN RESERVATION WITH INDIANS.

This court's opinion in ***United States v. Mazurie***, 419 U.S. 544 (1975), considered whether or not non-Indian defendants could be prosecuted in federal court under 18 U.S.C. §1161 for failing to comply with tribal alcoholic beverage licensing regulations of the Wind River Tribes in Wyoming. In reply to the contention that it was unfair to subject the non-Indians to regulation by a tribe, in whose government they could not, as non-Indians, participate, this Court replied as follows:

> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by this Court's opinion in ***Williams v. Lee***, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959). *In holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians*, we stated:
>
> "It is immaterial that respondent is not an Indian. ***He was on the Reservation and the transaction with an Indian took place there.*** The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. (419 U.S. at 557-8) [Emphasis added.]

The cited case of ***William v. Lee***, 358 U.S. 217

(1959), has been characterized by this Court as a "landmark decision." See *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973). The *McClanahan* case quotes with approval the following from *Williams v. Lee*, relating directly to the issue of Indian tribal court criminal jurisdiction over non-Indians herein:

> Over the years this Court has modified [the tribal sovereignty principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . Thus, suits by Indians against outsiders in state courts have been sanctioned . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation . . . ***But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.*** . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." (*McClanahan*, 411 U.S. at 171-2, quoting from *Williams v. Lee*, 358 U.S. at 219-20) [Emphasis added.]

While the *McClanahan* and *Williams* cases dealt with state taxation and state court civil jurisdiction over reservation Indians, respectively, it is significant that both cases have restated that "crimes by or *against* an Indian" are to be handled in either tribal or federal courts. In order for the phrase "against an Indian" to be meaningful, it must include offenses by a non-Indian against an Indian, since offenses "by an Indian" against another Indian would already be covered under the

category of offenses "by . . . an Indian". The only exception to the exclusive tribal-federal court jurisdiction would be offenses by a non-Indian against a non-Indian; the other combinations, Indian against Indian, Indian against non-Indian, and non-Indian against Indian, all come within the phrase "by or against an Indian" for which tribal jurisdiction is exclusive absent an *express* Congressional delegation to another forum. Such an analysis is consistent with the characterization of the *Williams v. Lee* rule contained in *United States v. Mazurie*, supra, 419 U.S. at 558:

> that the authority of tribal courts would extend over non-Indians, insofar as concerned their transactions on a reservation with Indians.

We submit that this last stated formulation provides a reasonable test and standard to be applied in defining the limits of tribal court jurisdiction over non-Indians. It would exempt from tribal court jurisdiction conduct in which the Indians or their tribe have no particular concern (e.g., crimes involving only non-Indians), while allowing Indian tribes to exercise governmental powers in matters involving members of the tribe and threats to the property, peace, health, safety, and welfare of the tribe and its members. As noted above under "Interest of Amicus Curiae," this is the jurisdictional approach which the Ute Tribe, amicus curiae hereof, has taken.

Such a standard can be reasonably analogized to established bases for finding jurisdiction in other contexts. For example, can it not be said that the act of

committing an offense against an Indian on a reservation or committing a breach of the peace or other disruptive conduct within an Indian reservation constitutes sufficient:

> minimum contacts with [the tribe] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)?

This standard ("transactions on a reservation with Indians"), though necessarily general in its pronouncement, can be refined and applied to the specific circumstances of each case by the judges, both tribal and otherwise, to whom the question is presented. Congress has imposed upon tribal courts the federal standards of both due process of law and equal protection of the laws, as well as specific restrictions relating to criminal procedures. See 25 U.S.C. §1302. Habeas corpus relief is available in federal courts to test the procedures of the tribal courts as applied to both Indians and non-Indians. See 25 U.S.C. §1303. Such protections extend to "persons," not merely to "Indians." See Point III herein below.

Certainly under the operative facts in the instant case it cannot be said to be unfair or unjust to subject Mr. Oliphant to tribal prosecution for his assaulting tribal police officers on Indian trust property during a tribal celebration. Likewise, in the case of Mr. Belgarde, it cannot be said to be unfair or unjust to subject him to tribal prosecution after he had been racing recklessly through the streets of an Indian community, with tribal officers in pursuit, for several hours. Such contacts are far more than minimal; they are recognized as breaches of the peace under any standard of law. Is it any less fair to apply the standards which govern Indian conduct off a reservation to non-Indian conduct on a reservation?

> Absent express federal laws to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-9 (1973).

The concept of residual, inherent sovereignty provides the theoretical basis for tribal court jurisdiction over non-Indians (see Point III below); the recent decisions of this Court provide the judicial precedent for extending such jurisdiction to criminal as well as civil actions. The repeated recognition of the "right of reservation Indians to make their own laws and be ruled by them" (*William v. Lee*, supra, 358 U.S. at 220) recognizes this power as a sovereign right, one which, if enforceable only against a portion of those who would break tribal laws, would be an empty right indeed. For if "self-determination" and "internal sovereignty" are to have any meaning, they must include the power to preserve the peace and order of the society possessing these powers. As in the case of other sovereignties, such as the States:

> The power and duty of the State to take adequate steps to preserve the peace and to protect

> the privacy, the lives, and the property of its residents cannot be doubted. (*Thornhill v. Alabama*, 310 U.S. 88, 105 (1940)).

This concept was recognized by the Court of Appeals below when it observed that:

> Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed. *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976).

To deny such fundamental attributes of sovereignty to Indian tribes would be to render their sovereignty meaningless, placing them at the mercy of persons whom they cannot control, having to look for protection from federal officials who often display indifference in becoming involved in another petty "Indian" case. For many Indian reservations, it is unfortunately still true in large measure as it was in the last century, that:

> They [the Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. *United States v. Kagama*, 118 U.S. 375, 383 (1886).

Effective law enforcement by federal officials is virtually non-existent on most Indian reservations. Federal investigate, prosecutorial and judicial authorities are generally far removed from Indian reservations, both physically and culturally. It is virtually impossible for most tribes to obtain federal prosecution of the

multitude of relatively minor, yet socially disruptive offenses, such as those committed by Messrs. Oliphant and Belgarde. As a practical matter, if the Indian tribes are held to have no jurisdiction over such offenses by non-Indians, the reservations will be converted from reserves for the benefit of the Indians to havens for the lawless among the whites. Such a result is inconsistent with Congressional policy, concepts of federal guardianship, and the precedents of this Court which "have consistently guarded the authority of Indian governments over their reservations." (*Williams v. Lee*, supra, 358 U.S. at 223).

II

THE OFFENSES OCCURRED WITHIN "INDIAN COUNTRY" AND ARE PROPERLY WITHIN TRIBAL JURISDICTION

The authority of an Indian tribe inhabiting an Indian reservation is geographically coextensive with the boundaries of that reservation, regardless of the ownership status of lands therein. Just as a state may define offenses occurring on private roads or other property within its boundaries, so may an Indian tribe. It is the existence of an exterior reservation boundary that defines the territorial extent of tribal jurisdiction, not the title status of each parcel of property therein.

Such an approach is not only consistent with common sense, but with federal law as well. 18 U.S.C. §1151 defines "Indian Country" as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within *the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation*, (b) all dependent Indian communities within the borders of the United States whether within the the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. [Emphasis added.]

As noted in this Court's opinion in *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975):

> If the lands in question are within a continuing "reservation," *jurisdiction is in the tribe* and the Federal Government "notwithstanding the issuance of any patent, [such jurisdiction] including rghits-of-way running through the reservation." 18 U.S.C. §1151(a) . . . While §1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.

Thus, the concept of "Indian country" as defined in 18 U.S.C. §1151 is definitive of the territorial extent of Indian tribal civil and criminal jurisdiction. There can be no reasonable question that Mr. Oliphant's alleged criminal conduct occurred within the territorial jurisdiction of the Suquamish Tribe, as his offense occurred on Tribal lands (lands held in trust for the Tribe by the United States). Mr. Belgarde's offense

occurred on a state highway and a county road within the exterior boundaries of the Tribe's recognized reservation. As developed above, such "rights-of-way" are a part of "Indian country" and within the territorial jurisdiction of the Tribe. As the Ninth Circuit Court of Appeals has previously held in a case involving the authority of a tribal officer to stop and search a vehicle on a state highway running through an Indian reservation:

> [W]e note that the fact that the events of interest here may have occurred within the right-of-way for a state highway avails the defendant nothing. Rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police. See, *Gourneau v. Smith*, 207 N.W.2d 256 (N.Dak. 1973); 18 U.S.C. §1151 (1970). *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975).

III

THE COURT OF APPEALS' RESIDUAL SOVEREIGNTY ANALYSIS IS CONSISTENT WITH EXISTING LAW

The long-standing decisions of this Court recognizing Indian tribal sovereignty have received recent reaffirmation. In declaring the inability of states to collect taxes on Indian income earned on a reservation, this Court has declared as follows:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolu-

tion of the issues in this suit, but because it provides a *backdrop* against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long *predates* that of our own Government . . . But it is nonetheless *still true*, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *United States v. Kagima*, 118 U.S., at 381-382, 30 L.Ed. 228. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172-3 (1973) [Emphasis added.]

See also *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

The dissent in the *Oliphant* opinion characterizes tribal "sovereignty" as "merely a veil used where the issue is, in fact, one of federal preemption of regulation in the field of Indian affairs." (*Oliphant, supra*, 544 F.2d at 1015). He has confused the "backdrop" referred to in *McClanahan, supra*, which set the stage for consideration and provides a point of reference from which to begin analysis, with the curtain ("veil") which obscures the stage from view. Tribal sovereignty is far

more than a mere analytical tool; it is a venerable doctrine fundamental to the entire field of Indian law.

As one example of how tribal sovereignty continues as a vital precept of Indian law, we cite the following as indicative of its pervasive and fundamental nature. Very recently, this Court has reconfirmed that Indian tribes possess sufficient sovereignty to *immunize* them from unconsented suite in state courts. See *Puyallup Tribe v. Department of Game*, ... U.S. ..... (45 U.S.L.W. 4837, June 23, 1977) citing *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1939).

Congress has likewise recently recognized that such sovereign immunity is an inherent and residual characteristic of Indian tribes. See 25 U.S.C. §450n:

> Nothing in this Act [the Indian Self-Determination and Education Assistance Act of 1975] shall be construed as—(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; . . .

Sovereign immunity for Indian tribes is a residual concept; the tribes are immune from suit because they were originally so as sovereign entities and this attribute of sovereignty has and will continue until modified by the Congress on behalf of the now dominant sovereign, the United States. 25 U.S.C. §450n does not grant sovereign immunity, it recognizes it as already existing.

This Indian Self-Determination and Education As-

sistance Act of 1975 (25 U.S.C. §450 *et seq.*) provides additional insights into the residual Indian sovereignty concept. Given Congress' recognized plenary authority over Indian affairs (see, e.g., *Winton v. Amos*, 255 U.S. 373, 391 (1921), and *Delaware Tribal Business Comm. v. Weeks*, ... U.S. ..... (51 L.Ed. 2d 173, 182-3) (1977)), the recent considered findings and pronouncements of the Congress should be entitled to serious consideration. The "Congressional statement of findings" accompanying this 1975 Act is instructive in several particulars relevant hereto.

> (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—
>
> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the *realization of self-government*, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) *the Indian people will never surrender their desire to control their relationship both among themselves and with non-Indian governments, organizations, and persons.* (25 U.S.C. §450) [Emphasis added.]

Not only has the Congress recognized the existence of

a continuing Indian "desire" to control relationships witth "non-Indian . . . persons," but such desire is linked to the concept of self-government and self-determination. The following section of this 1975 Act, 25 U.S.C. §450a, contains a "Congressional declaration of policy" which states, among other things, that, "The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination . . ." (25 U.S.C. §450a(a)).

The question of "The status of Indian tribes" has been used by this Court as a recognized example of a non-judicially reviewable political question. See *Baker v. Carr*, 369 U.S. 186, 215-6 (1962). See also, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). The Indian Self-Determination and Educational Assistance Act of 1975 is a clear Congressional (political) affirmation of residual tribal sovereignty as an attribute of Indian tribal status. Prior acts, relating to Indians generally, have been similarly framed. See, e.g., Section 16 of the Indian Reorganization (or Wheeler-Howard) Act of June 18, 1934 dealing with the "Organization of Indian Tribes": ". . . In addition to all powers vested in any Indian tribe or tribal council by existing law, . . ." (25 U.S.C. §476)

The more recent so-called Indian Civil Rights Act of 1968 (25 U.S.C. §§1301-1303, especially 1302) provides an interesting contrast to dissenting Judge Kennedy's analysis of 18 U.S.C. §§1152 and 1153. He reasons that because these earlier acts specifically refer to "Indians" in defining their scope and limits, that Con-

gress must have assumed that tribal courts could not exercise jurisdiction over non-Indians. See *Oliphant, supra*, 544 F.2d at 1015-1018. By contrast, both of sections 1302 and 1303 of Title 25, United States Code, refer to the rights of "persons" as opposed to "Indians" in reference to official actions by Indian tribes. For example, 25 U.S.C. §1303 provides:

> The privilege of the writ of habeas corpus shall be available *to any person*, in a court of the United States, *to test the legality of his detention by order of an Indian tribe.* [Emphasis added.]

25 U.S.C. §1302 spells out constitutional type rights as limitations on the powers of Indian tribes:

> No Indian tribe *in exercising powers of self-government* shall:
>
> * * *
>
> (3) subject *any person* for the same offense to be twice put in jeopardy;
>
> (4) compel *any person* in any criminal case to be a witness against himself;
>
> * * *
>
> (5) deny to *any person* in a criminal proceeding . . .;
>
> * * *
>
> (8) deny to *any person* within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> * * *
>
> (10) deny to *any person* accused of an offense

> punishable by imprisonment the right, upon request to a trial by jury of not less than six persons.

As recently as 1968, Congress has, by this Act, recognized that the "powers of self-government" of an Indian tribe can extend to "any person" and that such "persons" are protected in numerous areas exclusively and expressly related to criminal procedures. The cases which have considered the applicability of the protections of the Indian Civil Rights Act to non-Indians have found them to apply, noting that the substitute bill which was offered (in the basic form subsequently enacted), had originally referred to "American Indians" in delineating the beneficiaries of the rights to be established. This phrase was dropped in a later revision of the substitute bill which substituted the phrase "any person" for "American Indian," with the intent "to establish rights for all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians" (*Dodge v. Nakai*, 298 F.Supp. 17, 24 (D.Ariz. 1968)). See also *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 934 n.8 (10th Cir. 1975); *Schantz v. White Lightning*, 502 F.2d 67, 70 n.5 (8th Cir. 1974); *Hickey v. Crow Creek Housing Authority*, 379 F.Supp. 1002 (D.S.Dak. 1974). We submit that, as has been held in affirming certain implied powers of the United States, the imposition of a limitation on a power is "but an implied assertion" of the existence of the power. See, e.g., *Kohl v. United States*, 91 U.S. 367, 371-72 (1876) regarding the power of eminent domain as implied from the Fifth Amendment limitation thereon regarding the payment of just compensa-

tion. Congress has impliedly recognized the existence of tribal criminal jurisdiction over non-Indians by imposing limitations on the criminal procedures which can be applied to non-Indians and providing them with a federal habeas corpus remedy to test "the legality of their detention" under Tribal jurisdiction.

Indeed, this Court has recently considered the legislative intent behind 18 U.S.C. 1153 and concluded as follows:

> In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would "be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of others." That is emphatically not to say, however, that Congress intended to deprive Indian defendants of procedural rights guaranteed to other defendants. . . . *Keeble v. United States*, 412 U.S. 205, 211-12 (1973).

The majority opinion's concluding paragraph in *Keeble* expressly recognizes tribal criminal jurisdiction as an inherent, residual concept:

> Finally, we emphasize that our decision today neither expands the reach of the Major Crimes Act nor permits the government to infringe the *residual jurisdiction of a tribe* by bringing prosecutions in federal court that are not authorized by statute. *Id* at 214. [Emphasis added.]

In a subsequent case considering the history of 18 U.S.C. §1153, this Court notes the position of the

United States regarding the Congressional intent of the Major Crimes Act:

> [T]he Government [in *Keeble*] has characterized the Major Crimes Act as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian lands. *United States v. Antelope*, ... U.S. ..... (51 L.Ed.2d 701, 705 n.1) (1977).

Such limited Congressional intent should not be broadly expanded to include limitations on jurisdiction over non-Indians, particularly in light of the "eminently sound and vital canon" which requires that "statutes passed for the benefit ofIndians are to be liberally construed and all doubts are to be resolved in their favor." See *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

The concept of inherent tribal sovereignty has received continued recognition from the Executive branch of the Federal Government as well. In an opinion entitled "Powers of Indian Tribes," dated October 25, 1934, issued by the Solicitor of the Department of the Interior in response to questions regarding the meaning of the phrase "powers vested in any Indian tribe or tribal council by existing law" found in Section 16 of the Indian Reorganization (or Wheeler-Howard) Act of 1934 (48 Stat. 984, 987; 25 U.S.C. §476), the Solicitor states as follows:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which*

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are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. *What is not expressly limited remains within the domain of tribal sovereignty*, and therefore properly fails within the statutory category, "powers vested in any Indian tribe or tribal council by existing law."

> *The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference.* (55 I.D. 14, 19) [First emphasis in the opinion; others added.]

Accord, see Felix S. Cohen's, *Handbook of Federal Indian Law*, p. 122 (1942) and the United States Department of the Interior's *Federal Indian Law*, pp. 395-6 (1958).

Each coordinate branch of the Federal Government has recognized the existence of inherent tribal sovereignty as an historical fact which enjoys continuing validity. The Court of Appeals and the District

Court below have correctly premised their analysis of the issues herein on the existence of such tribal sovereignty.

IV

PAST FAILURE TO EXERCISE JURISDICTION OVER NON-INDIANS HAS NOT RESULTED IN THE LOSS OF INHERENT TRIBAL SOVEREIGN POWERS RELATING THERETO

In the opinion entitled "Powers of Indian Tribes", *supra*, issued shortly after passage of the Indian Reorganization (Wheeler-Howard) Act of 1934, Department of the Interior Solicitor Margold stated as follows regarding the vitality of the Sovereign powers of Indian tribes which had not theretofore been exercised:

> It is a fact that State governments and administrative officials have frequently trespassed upon the realm of tribal autonomy, presuming to govern the Indian tribes through State law or departmental regulation or arbitrary administrative fiat, but these trespasses have not impaired the vested legal powers of local self-government which have been recognized again and again when these trespasses have been challenged by an Indian tribe. "Power and authority rightfully conferred do not necessarily cease to exist in consequence of long nonuser." (*United States ex rel. Standing Bear v. Crook*, 5 Dill. 453, 460). The Wheeler-Howard Act, by affording statutory recognition of these powers of local self-government and administrative assistance in developing adequate mechanisms for such govern-

> ment, may reasonably be expected to end the conditions that have in the past led the Interior Department and various State agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves. (55 I.D. 14, 28-29 (1934)).

See also *Kohl v. United States, supra*, 91 U.S. at 73: "[T]he non-user of a power does not disprove its existence."

It has only been within the last few years that the prediction of Solicitor Margold has been partially realized with the approval by the Secretary of the Interior of Indian tribal codes asserting both civil and criminal jurisdiction over non-Indians within Indian reservations and in situations involving Indian interests. Congress, in which resides plenary authority over the subject matter, by such acts as the Indian Civil Rights Act of 1968 and the Indian Self-Determination and Education Assistance Act of 1975, has provided both implied and express recognition of, and support for, tribal sovereignty, including criminal jurisdiction over non-Indians "insofar as concern[s] their transactions on a reservation with Indians" (*United States v. Mazurie*, supra, 419 U.S. at 558).

CONCLUSION

Amicus curiae The Ute Indian Tribe submits that the Court of Appeals has properly analyzed and appropriately affirmed the jurisdiction of the Suquamish Tribe over appellants for the criminal offenses com-

mitted by them within that Tribe's reservation. The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 28th day of October 1977.

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Amicus Curiae

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
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Respondents.

BRIEF OF AMICI CURIAE:

The National Congress of American Indians,
The Arapahoe Tribe of Wyoming,
The Hoopa Valley Tribe of California, and
The Confederated Salish and Kootenai Tribes of Montana.

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BRIEF OF AMICI CURIAE:

The National Congress of American Indians,
The Arapahoe Tribe of Wyoming,
The Hoopa Valley Tribe of California, and
The Confederated Salish and Kootenai Tribes of Montana.

STATEMENT OF INTEREST

The tribal entities filing this brief are the ARAPAHOE TRIBE of the Wind River Reservation, Wyoming; the HOOPA VALLEY TRIBE of California; and the CONFEDERATED SALISH AND KOOTENAI TRIBES of the Flathead Reservation, Montana. They are federally recognized Indian tribes which reside upon and govern their respective reservations. The NATIONAL CONGRESS OF AMERICAN INDIANS is a national association of some 147 Indian tribes organized to represent the interest of American Indians.

Petitioners and respondents have consented to the filing of this brief, as indicated by appropriate letters of consent filed with the Court.

QUESTION PRESENTED

Petitioner Oliphant was involved in a fight with another person on tribal land at an annual tribal celebration. When a tribal officer intervened, Oliphant struck him and was charged under the tribal code with assaulting an officer. Pet. Br. 14. Petitioner Belgarde allegedly was racing his pickup truck on the streets of the town of Suquamish for several hours, with tribal police in hot pursuit. The chase ended with Belgarde's truck colliding with a tribal police car. He was charged under the tribal code with recklessly endangering another person, and injuring public property. *Id.* at 16-17. Both petitioners are non-Indians.

In both instances, the United States District Court below found that the tribal court had jurisdiction to punish petitioners. Both cases were appealed to the Ninth Circuit, which affirmed the tribal court's jurisdiction as to Oliphant. *Oliphant* v. *Schlie*, 544 F.2d 1007 (1976).

The question is whether an Indian tribe has retained the limited sovereign jurisdiction to impose minor punishment on a white person who breaches the peace of an Indian reservation in violation of tribal ordinances.

INTRODUCTION AND BACKGROUND

We submit that the Court's answer to the question here presented will determine whether tribal communities can have effective protection from minor crimes and breaches of the peace. State and federal law enforcement authorities have little interest in prosecuting minor infractions on Indian reservations. Tribes have learned from long experience that they will not receive adequate protection from minor infractions unless they furnish it themselves.

A large number of modern Indian tribes now have law and order systems (including codes, courts, judges, police and jails) which function well and which are constantly improving. *See* pages 17-21, *infra*. To deny their jurisdiction over whites who come onto their reservations is to leave a large gap in the authority which Indians need to protect the peace of reservation communities.

We note that this case only involves tribal *criminal* jurisdiction over non-Indians. Tribal *civil* jurisdiction over non-Indians is clear, at least when coupled with a tribal interest.[1]

When white men first came to America, they treated with the Indians as independent, sovereign nations, recognizing their superior strength and numbers. Later, as the balance in numbers reversed, the Indians were confined to reservations, to free up their vast hunting grounds for the white men's farms and ranches. Yet, on those reservations, Indians remained sovereign, subject only to the power of Congress when Congress chose to exercise it.[2]

In 1887, Congress declared that Indian reservations should be broken up into individual holdings, in order that the tribesmen might learn the benefits of private property and toil for self-gain, as their white neighbors.[3] This policy, known as the allotment policy, was a failure. Instead of adopting the white man's competitive, acquisitive ways, the Indian clung to his culture, often selling his allotment and becoming landless in the bargain. The allot-

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[1] *See, e.g., United States* v. *Mazurie*, 419 U.S. 544, 557 (1975); *Williams* v. *Lee*, 358 U.S. 217 (1959); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (tribe may tax non-Indians); *Cowan* v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.Dak. 1975); 23 Op. Atty. Gen. 214, 218 (1900); 55 Interior Dec. 14, 19 (1934).

[2] *United States* v. *Kagama*, 118 U.S. 375, 381-82 (1886).

[3] General Allotment Act, 24 Stat. 388 (1887), 25 U.S.C. § 331 *et seq.*

ment policy, by distributing the tribal property and bringing whites onto reservations, worked to impair the capability of tribes to govern themselves—which, indeed, was the very purpose of this policy.

In 1934, Congress, advised of the appalling social condition to which tribes and reservations had sunk, and of the crippling loss of tribal lands, enacted the Indian Reorganization Act.[4] Such tribal land as still remained unallotted was forbidden to be allotted further, and the right of allottees to sell their land was restricted. Tribes were strengthened as self-governing institutions and encouraged to adopt constitutions and to form business corporations to that end. The Secretary of the Interior was authorized to acquire land for Indians.[5]

Under the Indian Reorganization Act, tribes slowly began to reacquire the strength and land base necessary for effective self-government. This in turn brought them into greater contact with neighboring white communities. The friction created by this interplay, and perhaps local jealousy over the federal protection and privileges enjoyed by Indians, led Congress to its next major policy determination. This was to terminate federal protection of tribes, and let their future development be a part of state structures and government. The new policy was declared in 1953,[6] and thereafter a handful of tribes were actually terminated.[7]

But the termination policy, like the allotment policy, was a failure, and it was quietly abandoned after a decade

[4] 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

[5] *See Morton* v. *Mancari*, 417 U.S. 535, 542-43 (1974).

[6] H. Con. Res. 108, 67 Stat. B132.

[7] Six Indian groups were terminated in 1954 (*e.g.*, Menominee, 25 U.S.C. § 891), two more in 1956, two more in 1958, and one in 1962. There have been no terminations since then, and in fact the Menominees have been restored. 87 Stat. 770 (1973).

in favor of a return to a policy of federal assistance, coupled with renewed federal encouragement of tribal development of economic and self-government resources. Dozens of programs for tribal dvelopment were instituted by the Bureau of Indian Affairs, many of which were successful.

In 1970, long after the termination policy had been informally repudiated, President Nixon delivered a major message to Congress on Indian policy, remarkable for its scope and understanding. He declared:

> "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[8]

He stated that forced termination of the Indians' federal relationship was wrong, as was the opposite extreme, excessive dependence upon the federal government. The correct path, he said, was between these two extremes, *i.e.*, a policy of "self-determination."

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act,[9] carrying forward the policy declared by President Nixon.

Today, as a result of the process begun through the Indian Reorganization Act of 1934, and reaffirmed by President Nixon in 1970 and the Congress in 1975, many Indian reservations are effective, modern, self-governing communities, operating much like counties and municipalities—except that they are under the federal structure, rather than the state structure. Over 100 tribes now have their own law and order systems (*i.e.*, legal codes, courts, judges, police, and jails).[10] As far as criminal matters are

[8] 6 Pres. Doc. 894 (1970).

[9] 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*

[10] See description by American Indian Policy Review Commission, pages 18-19, *infra*.

concerned, Congress has provided that these systems may not impose any punishment greater than a $500 fine and six months in jail, and persons who appear before the court are guaranteed most of the rights provided to non-Indians under the U.S. Constitution.[11]

In the entire history of the relationship between white persons and Indians, there has previously been only one reported court case involving a tribe's punishment of a white person for breach of tribal law.[12] Prior to 1887 this is not surprising, because there was little intermingling of whites and Indians on reservations, except for those whites who were assimilated into the Indian communities, usually through intermarriage. Indeed, the *Kenyon* case involved such a person. *See* page 14, *infra*.

Between 1887 and 1934, many tribal governments were functioning poorly or worse, and it is not surprising that no cases arose during that period.

It seems a little surprising that no case arose during the period 1934 to 1953, when many tribal governments were revived under the Indian Reorganization Act, but perhaps this was because newly emerging tribal governments were unwilling to display the aggressiveness necessary to exercise criminal jurisdiction over members of the dominant society.

But after the termination period was over (1953-1962) and modern tribal governments, staffed by more educated and self-confident Indians, began to mature, it was inevitable that the question of criminal jurisdiction over non-Indians would arise, and finally, in the instant case, it has.

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[11] Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. § 1301 *et seq.*

[12] *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720).

The issue of Indian criminal jurisdiction might have arisen on, say, the Quinault Reservation in Washington State, which has an area of 190,000 acres (entirely rural), a population of about 1,100 Indians and 200 non-Indians, and a comparatively well-equipped law and order system. Or, it might have arisen on any of a number of other reservations where the population is predominantly Indian and where there are modern law and order systems. The fact that the matter of tribal jurisdiction over non-Indians has arisen on an Indian reservation where the non-Indians far outnumber Indians should not cloud the issue. The issue should not turn on which race predominates, but on whether Congress has diminished the tribe's original sovereignty by terminating or curtailing tribal criminal jurisdiction over non-Indians who breach the peace of the reservation.

We realize that this issue is not simple, nor the answer clear at first glance. However, we believe that the answer that emerges from research, reason, and appreciation of history is that Congress has not acted with the requisite affirmative action to terminate such jurisdiction.

ARGUMENT

1. Criminal Jurisdiction is a Necessary Incident to Tribal Sovereignty.

In a long line of decisions, the Court has consistently affirmed the dual principles that Indian tribes possess attributes of internal sovereignty and that they have full jurisdiction over matters essential to that sovereignty. Chief Justice Marshall, in the seminal cases of *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), referred to Indian tribes as "domestic dependent nations" and "distinct, independent political communities." The Court in *United States* v. *Kagama*, 118 U.S. 375,

381-82 (1886) described Indians as "semi-independent," "a separate people, with power of regulating . . . internal and social relations." More recently, after tracing the evolution and modification of the Indian sovereignty doctrine since *Worcester*, the Court concluded that Indians remain a semi-independent people, vested with many attributes of sovereignty. *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168-73 (1973). That sovereignty extends not only over tribal members but also over all tribal territory.[13]

The touchstone for residual tribual sovereignty has been the concepts of self-governance and maintenance of essential tribal relations. *Williams* v. *Lee*, 358 U.S. 217, 219-220 (1959).[14] Courts have recognized as incidents of Indian sovereignty the authority to adopt laws and establish courts for their enforcement,[15] to regulate the

[13] *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). *See also Morton* v. *Mancari*, 417 U.S. 535, 554 (1974) ("quasi-sovereign" tribal entities); *Williams* v. *Lee*, 358 U.S. 217, 219 (1959) (basic sovereignty principles expressed in *Worcester* remain applicable). *Cf.* Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*

[14] The Court recently asserted:

> "In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'"

Fisher v. *District Court*, 424 U.S. 382, 386 (1976) (citing *Williams* v. *Lee*, *supra*).

Although the present case does not, strictly speaking, involve a conflict between tribe and state, its ultimate resolution will require considering to what extent tribal, state and federal courts have jurisdiction on reservations, exclusively or concurrently.

[15] *Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883); *Ortiz-Barraza* v. *United States*, 512 F.2d 1176, 1179 (9th Cir. 1975) (power to create and administer criminal justice system inherent in Indian sovereignty); *Colliflower* v. *Garland*, 342 F.2d 369, 376 (9th Cir. 1965); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89, 94 (8th Cir. 1956).

domestic relations of tribal members,[16] to safeguard and develop tribal property,[17] to tax inhabitants and persons transacting business on the reservation,[18] to provide services to members on the reservation,[19] and to be immune from suit.[20] *See generally* Powers of Indian Tribes, 55 Interior Dec. 14 (1934); 25 U.S.C. § 476 (1970).

In light of these holdings on Indian sovereignty and its attributes, the initial inquiry to be made here is whether an Indian tribe's ability to enforce its criminal laws against non-Indians is fundamental to its internal self-government. We submit that criminal authority (concurrent where appropriate) over *all* individuals on the reservation, Indian and non-Indian, within the limits of course of the Indian Civil Rights Act, is a necessary attribute of tribal self-government and consistent with previous holdings on Indian criminal jurisdiction.

With the arguable exception of major crimes,[21] Indian

Indian jurisdiction in civil matters affecting the rights of the tribe has repeatedly been upheld by the Court. *E.g.*, *United States* v. *Mazurie*, *supra*; *McClanahan* v. *Arizona State Tax Commission*, *supra*; *Kennerly* v. *District Court*, 400 U.S. 423 (1971); *Williams* v. *Lee*, *supra*.

[16] *Fisher* v. *District Court*, 424 U.S. 382, 386-89 (1976); *United States* v. *Quiver*, 241 U.S. 602, 603-05 (1916).

[17] *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 663-64 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

[18] *Iron Crow* v. *Oglala Sioux Tribe*, *supra*, 231 F.2d at 98-99; *Buster* v. *Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599-600 (1906).

[19] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-53 (1973).

[20] *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940).

[21] 18 U.S.C. § 1153.

tribes indisputably have authority to enact and enforce laws governing their own members.[22] It requires no stretching of legal principles to state that similar criminal jurisdiction is necessary over non-Indians present on the Indian reservation—whether they be trespassers, visitors, or residents.[23] To maintain peace on the reservation and stability in tribal relations, an Indian tribe must be able to proscribe offensive conduct on its reservation and to enforce these proscriptions through the powers of arrest, prosecution and punishment. "[T]he power to regulate is only meaningful when combined with the power to enforce." [24]

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[22] The General Crimes Act, 18 U.S.C. § 1152, recognizes this general Indian authority by expressly excepting from federal jurisdiction crimes by Indians against Indians, and crimes by Indians against non-Indians where the Indian offender is punished by the tribe.

[23] *Cf. Morris* v. *Hitchcock*, 194 U.S. 384, 389 (1904) (Indian authority to control intruders on reservation); *Arizona ex rel. Merrill* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

[24] *Ortiz-Barraza* v. *United States*, 512 F.2d 1176, 1180 (9th Cir. 1975). *See also* Memorandum from Commissioner of Indian Affairs to Deputy Solicitor, Department of Interior, September 3, 1976, reprinted in 1976 Indian L. Rep. i-8.

A tribal chairman has stated:

> "This question [of tribal jurisdiction] arises with reference to violations of the fish, game and recreation code, traffic and boating offenses, criminal actions, repossessions of personal property, removing property from the reservation, whether it be plants, minerals, gems, rocks or personal property . . . [, d]esecrating or interfering with tribal graveyards, both historic and prehistoric in the non-Indian sense, and the desecration or interference with areas of the reservation having substantial religious significance to the tribe.
>
> "It is our position that every person entering the exterior boundaries of the reservation has consented to the jurisdiction of the tribe, and its courts, and the tribe has the jurisdiction because of its sovereignty to take such action as is necessary to enforce its laws."

Final Report of Task Force Four to American Indian Policy Review Commission (AIPRC) on Federal, State, and Tribal Jurisdiction 99 (Comm. Print 1976) (testimony of Mr. Buck Kitcheyan, Chairman, San Carlos Apache Tribe). For background on the AIPRC, *see* note 38, *infra*.

To say that tribes may control breaches of the peace by binding over offenders to state or federal authorities is not a viable answer. If that is their only criminal power over non-Indians, it casts Indian police and tribal courts in the role of agents and spectators, rather than law enforcers. It subjects Indian authorities to the risk of lawsuits for false arrest if they err in handling offenders, however innocently. And, it results in Indians and non-Indians being subject to different standards of conduct and culpability.

Perhaps most important and problematic, a potential non-Indian offender would be emboldened by the knowledge that the Indian tribe—the party most concerned with the misconduct and generally the only party desirous of doing something about it—would lack the direct means to punish him. In essence, Indian tribes would be at the mercy of distant, normally unconcerned state and federal authorities for law enforcement assistance and effectuation.[25] Under these circumstances,

> "The dignity of the tribal government [would suffer] in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior [would] necessarily [follow]." [26]

Given this significant relationship between tribal sovereignty and criminal jurisdiction, the Court should recognize the tribe's power to enforce its laws against

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[25] *Oliphant* v. *Schlie*, 544 F.2d at 1013-14; *see also* Final Report of Task Force Four to AIPRC, *supra* note 24, at 37-39.

[26] *Oliphant* v. *Schlie*, 544 F.2d at 1014.

non-Indians as an essential, inherent part of residual Indian sovereignty.

2. The Applicable Federal Treaties and Statutes Do Not Bar the Exercise of Indian Jurisdiction Over Non-Indians.

In recent years, tribal sovereignty has served as a convenient starting point for the Court's analysis of jurisdictional issues—not as a final solution to the problem. Courts have come to rely less on residual or "platonic" notions of sovereignty than on relevant treaties and statutes for resolving questions of tribal jurisdiction. The Court referred to this trend in *McClanahan* v. *Arizona State Tax Commission, supra*:

> "The Indian sovereignty doctrine is relevant . . . not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read." [27]

In analyzing Indian treaties and statutes, certain defined canons of construction must be recalled: (1) Indian treaties and laws are to be liberally construed, with doubts and ambiguities resolved in favor of the Indians; [28] (2) Indian treaties are to be interpreted as the Indians would have understood them; [29] and (3) Indian treaties are not generally grants of rights *to* tribes, but grants of rights *from* Indian tribes.[30]

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[27] 411 U.S. at 172. *Cf.* Powers of Indian Tribes, 55 Interior Dec. 14, 57 (1934):

> "[T]he question of tribal criminal jurisdiction [must be] dealt with . . . by asking, first, what the original sovereign powers of the tribes were, and then, how far and in what respects these powers have been limited." *Id.*

[28] *E.g., Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

[29] *E.g., Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 631 (1970).

[30] *E.g., United States* v. *Winans*, 198 U.S. 371, 381 (1905).

The Court of Appeals below started with the proposition that the tribe originally had criminal jurisdiction over non-Indians on the reservation and still possessed it unless it had been terminated by Congress. The court held that jurisdiction had never been terminated.

The court found that the two treaties between the United States and the Suquamish Indians were silent on the tribe's power to try non-Indian criminals,[31] and that three allegedly relevant statutes—18 U.S.C. § 1152 (sometimes called the General Crimes Act), 25 U.S.C. § 1302 (Indian Civil Rights Act), and 25 U.S.C. § 1321 (Public Law 280), as amended—did not operate to deprive Indian tribes of criminal jurisdiction over non-Indians.[32] The court accordingly ruled that original Indian criminal jurisdiction within the reservation had not been extinguished. We comment briefly on the General Crimes Act, 18 U.S.C. § 1152, which petitioners claim preempts tribal jurisdiction over non-Indians, and which seems to be the key statute in this case.

18 U.S.C. § 1152 provides:

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> "This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over

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[31] Treaty of Point Elliott, 12 Stat. 927 (1859); Agreement With Indians Residing on Port Madison Indian Reservation, 33 Stat. 1078 (1905); *see Oliphant* v. *Schlie*, 544 F.2d at 1010.

[32] *Oliphant* v. *Schlie*, 544 F.2d at 1010-12.

such offenses is or may be secured to the Indian tribes respectively."

There is nothing on the face of this statute that ousts tribal criminal jurisdiction over non-Indians. In view of the applicable canons of construction, only an express ouster, or one clearly and necessarily implied, would be effective to achieve that drastic result. Given its natural and proper meaning, the statute merely adds *concurrent* federal jurisdiction to the already extant Indian jurisdiction over offenses committed in Indian country. In view of the de facto lack of any adequate tribal law and order systems on Indian reservations, it was found necessary in the early 1800's to extend federal power onto reservations and to delineate areas of exclusive Indian jurisdiction and concurrent Indian-federal jurisdiction. This interpretation of 18 U.S.C. § 1152 is supported by legislative history and by case law of the period.[33]

The leading case to the contrary, *Ex parte Kenyon*, 14 F.Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720), is not sound authority against Indian jurisdiction. *Kenyon's* actual holding is that an Indian tribe in the Indian Territory lacked criminal jurisdiction over a white man who had married into the tribe, and later when his Indian wife died, moved to Kansas to live and there sold his deceased wife's horse, supposedly a crime. The court held that because the crime, if any, was committed in Kansas, and hence beyond the territorial jurisdiction of the tribal court, the tribal court lacked subject matter jurisdiction.[34] The federal court added, as an independent second reason for the tribal court's lack of jurisdiction, that at the time of the crime, the defendant had abandoned his Indian ties. For this holding the court gave

[33] H.R. Rep. No. 474, 23d Cong., 1st Sess. 13, 36-37, 98 (1834); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[34] *Contra, Settler* v. *Lameer*, 507 F.2d 231 (9th Cir. 1974), holding that the Yakima tribal court had jurisdiction to punish members who violated tribal fishing laws outside the reservation.

no rationale, but merely cited R.S. § 2146, on the bare, uncritical assumption that a tribal court has jurisdiction only over Indians. Without an explanation of what (and whether) the court thought about the concurrent jurisdiction argument and about the canons of construction, which it apparently ignored, the case can have little or no weight for the proposition that there is no concurrent jurisdiction.

In contrast, Oliphant's and Belgarde's offenses here were committed upon the reservation, and breached the peace and welfare of the tribe governing the reservation.

There are good legal, moral and practical reasons why 18 U.S.C. § 1152 should be ruled concurrent, with the tribal authorities therefore able to prosecute and punish these non-Indian offenders. On its face, 18 U.S.C. § 1152 shows that Congress assumed that at lease *some* criminal jurisdiction is concurrent; that is, Congress must have assumed that where an Indian commits a crime against a white person, both tribal and federal courts would have jurisdiction. This is clear because § 1152 cancels the federal jurisdiction where the Indian "has been punished by the local law of the tribe." Obviously, Congress would not have canceled jurisdiction that it thought did not exist in the first place.

We will grant that Congress also apparently assumed that tribes would not have jurisdiction over white criminals. Otherwise, it undoubtedly would have given the non-Indian wrongdoer the same double jeopardy protection as the Indian wrongdoer. But this was a mistaken *assumption* by Congress, and not a substitute for language expressly ousting preexisting tribal jurisdiction, an ouster which could not take place without such language.

When Congress enacted the General Crimes Act, 18 U.S.C. § 1152, it was not its purpose to displace one

criminal justice system with another. Had that been its purpose, there surely would have been some evidence of it. Essentially, the statute was designed to fill a vacuum. Whether Congress *would* have terminated tribal jurisdiction over non-Indians, if someone raised the issue, will never be known. That would have been easy to do, if Congress intended to do it. But apparently the issue was not raised, and Congress was silent on the point. Surely such silence should not be construed to oust the jurisdiction which tribes require, and are able to assert, to maintain the peace and welfare of reservation communities.

3. Tribal Courts Are Capable of Fair and Efficient Justice.

An underlying assumption of petitioners' claims is that they cannot obtain justice within the Indian tribal court system. For example, they assert that, as non-Indians, they had no voice in enacting the tribal ordinances under which they were arrested; that non-Indians would be excluded from the jury panels; and that due process and judicial competence are lacking in the tribal court system. We respond that petitioners' rights are adequately protected by the Indian Civil Rights Act of 1968, which incorporates most of the Bill of Rights into Indian judicial proceedings.

As previously indicated, the Indian Civil Rights Act provides protections to parties in tribal court proceedings commensurate with constitutional standards. The Act sets out prohibitions against illegal searches and seizures; against placing defendants in double jeopardy; against self-incrimination; against denial of a speedy, fair, and public trial, including the right of confrontation and assistance of counsel; against excessive bail and cruel and unusual punishment; against denial of equal protection and deprivation of due process; and against denial of trial by jury, consisting of not less

than six persons. 25 U.S.C. §§ 1302(2), (3), (4), (6), (7), (8), (10). Furthermore, criminal penalties are limited to six months imprisonment and/or $500 fine, effectively restricting tribal courts' power to minor sanctions.

In short, basic Anglo-American values are to be applied, with few exceptions, such as the right to free counsel—and those exceptions only to accommodate practical and cultural tribal needs.[35]

A second factor serving to undercut petitioners' objections is the improving quality of tribal courts and Indian justice. Modern tribal courts (of which today there are around 128) have their origin in the Courts of Indian Offenses, created originally in the late 1800's by the Bureau of Indian Affairs and formalized under the Indian Reorganization Act of 1934.[36] While Indian tribal courts vary greatly in jurisdiction, operation, and quality, it may accurately be said that, "Indian tribal courts throughout the United States are in a dynamic

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[35] These exceptions, in view of the limitation of tribal courts to minor sanctions, pose no constitutional problems. This Court has previously recognized differences between constitutional and procedural requirements for federal and state courts. *E.g.*, *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) (unanimity requirement for juries); *Williams* v. *Florida*, 399 U.S. 78 (1970) (12-man federal jury versus six-man state jury). The Court has also qualified the right to jury trial for petty crimes or offenses. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). *Cf. King* v. *Morton*, 520 F.2d 1140 (D.C. Cir. 1975) (applicability of trial by jury in territory of Samoa).

Here, of course, it is premature for petitioners to contend that their rights to a fair trial and to due process will be violated. The Suquamish Indian Tribe may include non-Indians in the venire. The objection on grounds of non-participation in the drafting of the tribal code has already been rejected by this Court. *United States* v. *Mazurie*, *supra*, 419 U.S. at 557-58.

[36] *See generally Colliflower* v. *Garland*, 342 F.2d 369, 372-74 (9th Cir. 1965) (history of Indian tribal courts); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89, 94-98 (8th Cir. 1956) (same); American Indian Lawyer Training Program, *Indian Self-Determination and the Role of Tribal Courts* 13-35 (1977); W. Hagan, *Indian Police and Judges* (1966).

stage of growth, both in numbers and importance." [37]

There is not a great deal of current or comprehensive information on modern tribal courts and criminal justice systems. An excellent summary statement is contained in the Final Report of the American Indian Policy Review Commission:[38]

> "In addition to preexisting tribal systems and 25 CFR systems, many tribal governments have created justice systems in the context of their inherent sovereignty, and under the auspices of the Indian Reorganization Act. In 1976, there were 117 operative tribal courts in Indian country; this represents an increase of 32 courts since 1973 when there were 85. In 1973, Indian tribal courts handled approximately 70,000 cases; although this caseload has increased, no actual current figures are available. . . .
>
> "The 117 Indian justice systems vary considerably from one another in both design and effectiveness. Like their non-Indian counterparts, Indian court

[37] Collins, Johnson, and Perkins, *American Indian Courts and Tribal Self-Government*, 63 A.B.A.J. 808, 811 (1977); *see also* Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not"*, 62 A.B.A.J. 1002 (1976).

[38] American Indian Policy Review Commission, Final Report, vol. 1, at 167-68 (Comm. Print 1977).

The American Indian Policy Review Commission was established by Public Law No. 93-580, 88 Stat. 1910 (1975), "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." 25 U.S.C. § 174 note. The Commission was composed of 11 members—three members from the Senate, three members from the House of Representatives, three members from recognized Indian tribes, one member from a non-recognized Indian group, and one member to represent urban Indians. Eleven task forces were set up to investigate areas ranging from tribal government to Indian health and education to problems affecting urban Indians. The Commission's Final Report was submitted to Congress on May 17, 1977, culminating two years of research, hearings, and investigation.

judges are both appointed and elected. There is no uniform standard, but as a general rule, most tribal judges are not attorneys. At least one tribe requires applicants for judicial positions to pass an oral and written test on the tribe's constitution and laws. Indian tribal courts function in both criminal and civil matters. In some areas, both the judicial and police functions are contracted from neighboring non-Indian communities. In at least one area, a non-Indian government contracts law enforcement services from a tribal police department. Some tribes provide extensive representation for indigent persons in tribal court; others provide none. Police services may be provided entirely by tribal police, by BIA officers or by a combination of BIA and tribal police. Tribal appellate systems also vary greatly. On some reservations, there is no appellate court system. Where tribes utilize 25 CFR Courts of Indian Offenses, appeals follow through the Department of the Interior. Some tribes have their own appellate court system; others use judges from neighboring tribes for special appeals. The tribal council may also constitute itself as the final tribal appellate system.

> "Any generalization about tribal courts and law enforcement systems is therefore vague by definition. These are evolving institutions responding to tribal and community needs and operating at various levels of sophistication. Contrary to the views of some, there does not appear to be anything inherent in tribal justice systems that makes them any less capable than their non-Indian counterparts in dispensing justice." [39]

[39] *See also* Final Report of Task Force Two to AIPRC on Tribal Government 255-56, 271-83 (Comm. Print 1976); Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 553-64 (1976).

According to 1977 figures from the Department of Interior, there are presently 71 tribal courts, 32 "CFR" courts (*i.e.*, Courts of

This description reflects the variety, evolution, and capacity of Indian tribal courts. No doubt not all tribal courts are models of jurisprudence, but neither are all state and federal courts. Improvements are occurring rapidly and on a broad front. They include: (1) increased federal and tribal funding for training judicial and legal personnel and for improving court facilities; (2) establishment (in 1970) of the National American Indian Court Judges Association to organize ongoing judicial education programs;[40] (3) revision of tribal constitutions, codes and bylaws;[41] (4) approval by several Public Law 280 states of retrocession back to tribes; and (5) federal and state court decisions recognizing and expanding Indian jurisdiction.[42]

Indian Offenses), and approximately 25 traditional courts. The difference between tribal courts and "CFR" courts is that tribal courts are funded by and an organic part of the tribe rather than the Bureau of Indian Affairs.

A recent survey by the American Indian Lawyer Training Program describes in some detail the organization and operation of 98 tribal court systems. *See Indian Self-Determination and the Role of Tribal Courts, supra* note 36, at Appendix D. Of 85 tribes responding to a question on Indian jurisdiction, 31 tribes indicated that they presently exercised criminal jurisdiction over non-Indians. Thirty-nine tribes stated that they did not but were adopting or considering necessary changes (*e.g.*, amendment of tribal constitution or code) to permit assertion of such jurisdiction. Thirteen tribes said that they had no desire to exercise civil or criminal jurisdiction over non-Indians. *Id.* at Appendix C-11, C-12 (questions 52 and 55).

[40] *See generally* National American Indian Court Judges Association, Inc., Justice and the American Indian (1974) (five-volume work on Indian judiciary and Public Law 280, separation of powers, extradition procedures, basis of tribal law and order authority, and federal jurisdiction over major crimes).

[41] *E.g.*, Pet. App. B 6-8, 39 *et seq.* (Suquamish Constitution and code); *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1143-44 (8th Cir. 1973). *See* 25 U.S.C. § 1311; 25 C.F.R. Pt. 11.

[42] *Cf. Wakefield* v. *Little Light*, 276 Md. 333, 347 A.2d 228 (1975) (tribal proceedings accorded full faith and credit); *Jim* v. *CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (1975) (same).

The rise of the Indian tribal court has paralleled the recent movement away from dispersal and assimilation of Indians, a trend that has waxed and waned over 200 years of American history. Stronger, more competent, and more respected tribal courts are an important part of Indian identity and self-determination. They are a renewed force in reservation life, significant for both Indians and non-Indians.

CONCLUSION

For the reasons stated, we respectfully urge the Court to affirm the decisions below, as requested by respondents.

Respectfully submitted,

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October 28, 1977

As indicated, *supra* note 39, not all tribes wish or are able to exercise criminal jurisdiction over non-Indians. In some instances, there are treaty or tribal code prohibitions against such jurisdiction. *E.g.*, *Quechan Tribe of Indians* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976) (code's limitation of jurisdiction to members of tribe); Treaty with the Willamette Indians, 10 Stat. 1143, 1145 (1855); F. Cohen, *Handbook of Federal Indian Law* 364 (1972 Reprint). In other cases, practical realities may result in a policy of abstention, such as the tribe's size, location, economic ability, and relationship with non-Indians. *See* Final Report of Task Force Four to AIPRC, *supra* note 24 at 89.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

CONSENT TO FILING OF BRIEF AMICUS CURIAE

Petitioners and Respondents consented in writing to the filing of this brief. Letters of consent have been filed with the Clerk.

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA) is a voluntary, non-profit organization of the chief elected or appointed officers of reservation Indian tribes or federally recognized tribes with federal trust lands or with members who live on or near federal reservations having a local governing entity. Approximately 190 federally recognized tribes having populations representing around 90 percent of the estimated 800,000 American Indians are represented in NTCA.

NTCA was founded as the official voice of Indian tribal leadership to insure preservation of the trust relationship between the United States Government and reservation Indians, to protect reservation human and natural resources, and to promote Indian self-determination. It has always been committed to the principle of inherent Indian tribal sovereignty, limited only by treaty or specific legislation.

As shown at p. 35, *infra,* there are 71 tribal courts created in much the same manner as the Suquamish court. There are 56 other Indian courts operating under differing authorities. The ability of all of these courts to discipline non-Indian miscreants within reservations would be jeopardized if Petitioners' position was sustained. It is obvious that with free passage of citizens into, on and through reservations, not all law offenders are, or will be, Indians.

NTCA believes preservation of jurisdiction in tribal courts to preserve an orderly society within reservation boundaries is essential for the type of society In-

dians and Congress alike are trying to evolve and maintain.

Petitioners and their supporting *amici* would have this Court believe that the jurisdiction against which they rail should depend largely upon the relative populations of the Indian and non-Indian communities of the Port Madison Reservation and the size of the non-Indian fee land base there. Brief for Petitioners at 8-9; Brief for Attorney General, State of Washington at 2-3; Brief for Kitsap County at 2. Petitioners further assert that the Suquamish have not had a tribal community for some time. Brief for Petitioners at 9. On the other hand, South Dakota points to large reservation areas within that state, the significant non-Indian population living within the boundaries of those reservations, and some 95 "attempts" by tribes in that State to enforce their laws through their tribal courts against non-Indians. Brief for South Dakota at 2.

However, in any such weighing of particulars it becomes obvious, that Port Madison and the Suquamish in many ways are not typical of "Indian country."[1] Those opposed to the Suquamish would give no consideration to the vast reservations of the Southwest, many of which are wholly owned by the tribes and have overwhelming Indian majorities. Between the situation at Navajo, for example (13,989,222 acres,

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[1] We invoke the concept of a typical tribe or reservation advisedly. There are tribes smaller than Suquamish which have courts, but they most often possess reservations with much lower percentages of allotted or non-Indian land or a lower ratio of non-Indian population, *e.g.* Kaibab, Picuris Pueblo. See Appendix A to this Brief. Other tribes have high ratios of allotted land, but with a lower percentage of non-Indians. *Id.* It should not be concluded, however, that Suquamish is unusually small or that it is atypical in consisting largely of allotted land.

92.5 percent tribally owned; total population of nearly 133,000, only 5.5 percent non-Indian) and that of the Suquamish there is a broad range of tribal circumstance that must be considered, if the Court is disposed to consider the "policy" arguments espoused by South Dakota *et al.*, because the Court's decision will, if in favor of Petitioners, have dire impact on all tribes, heaviest on those most in need of routine law enforcement. (See App. A to this Brief.) A just resolution of the matter requires a considerably more complete analysis of fact than is afforded by the record in the *Oliphant* and *Belgarde* cases. And Kitsap County admits as much. Br. Brief for Kitsap County at 2a.

Petitioners and Kitsap County further argue that the Suquamish do not have much of a court. Brief for Petitioners at 17-18; Brief for Kitsap County at 18-20. The volume of business of the Suquamish court may indeed be low and it does not possess elaborate facilities or the familiar externals of modern courts.

But, there is much more to consider:

At the other end of the scale, for example, is the rather sophisticated Navajo court system which handled 29,843 cases in 1972.[3] Along the varying spectrum exist a large number of courts which play vital roles in the preservation of order and Indian self-government.

Petitioners and their *amici* construct their notions of "common sense" by emphasizing those facts which render the Suquamish court quite atypical of the great majority of reservations and tribal courts.[4] Yet they

[3] *See* Fahey, *Native American Justice: The Court of the Navajo Nation*, 59 JUDICATURE 10 (1975).

[4] See note 1, *supra*. We do not suggest that the Suquamish court is atypical of tribal courts other than as specifically noted herein, nor do we question the tribal court's ability to dispense due process of law. The District Court in fact specifically found compliance with the Indian Civil Rights Act in *Oliphant*. Mem. Op. (W.D. Wash. Apr. 5, 1974); J. App. 51-52.

urge a ruling of broad general application to all tribes based on the Suquamish situation. The impropriety is plain.[4] This brief is directed to clarification of the factual basis upon which such an important issue should be decided and which has been obscured by Petitioners and their record-supplementing *amici*.

The larding of the Kitsap brief by reference to petitions, newspapers articles, County Board of Education estimates, letters from community clubs, and the like (pp. 2, 4, 5, 7, 8) tends to support the conclusion of the Kitsap County Commissioners that there is a "rather tense situation" in that Washington County. Brief at 1a. (We suggest it may arise from the well known fisheries differences.) The brief of South Dakota and associated *amici* contains overtones that officials of several states fear non-Indian defendants facing a judge of another race even though that judge is a United States citizen.

The exaggerated claims of South Dakota are perhaps exposed by the statement (first printed page) that "the following *States* by their respective Attorneys General join in the views expressed" in the South Dakota brief (emphasis added). Since when Attorneys

[4] The Solicitor General could not, when he advised the Court that the opinion of the Ninth Circuit presented a question worthy of certiorari, have expected that various public officials would appear and convert the case into an *ad hominem* attack upon the Suquamish tribe and court and seek to raise "policy" questions better addressed to Congress.

General became endowed with the authority to speak for an entire state on what the brief claims to be unprecedented question we do not know. Witness the opposed positions in this case of the Attorney General and the Governor of Washington. The political, rather than judicial nature of the South Dakota drive is confirmed by the last paragraph of its Summary of Argument which refers to the "*policy* questions involved in this case," dilates on what it believes "*federal Indian policy*" to be and offers what it thinks a "*viable policy*" would be (emphasis ours). Brief for South Dakota at 6-7. This would leave little for Congress.

Thus, NTCA is justified in regarding the entire Indian tribal court system as under attack and in rising to its defense. One, and perhaps a sufficient, answer to these state and county officials is that the tribal courts, however formal or informal they may be, must have been dispensing substantial justice regardless of race, else South Dakota and its associated *amici* would point to numerous non-Indian defendants who have been released by federal writs of habeas corpus under the Indian Civil Rights Act after unfair convictions.[5] Here the writ was sought by "tense" defendants *before* trial.

Jealousy, or racial inhospitality by local non-Indian elected officials may explain why South Dakota and its friends would do away with tribal court jurisdiction over all persons accused of misdemeanors within reservations. However, it does not excuse a failure to show that non-Indians are being treated unfairly by tribal

[5] Note the informal statistics submitted herewith showing the appreciable number of non-Indian defendants who have been before tribal courts, pp. 40-42, *infra*.

courts or that such courts interfere with state law enforcement.

Indian tribes possess, within congressional limits, the powers of other governing entities, including police powers, and territorial jurisdiction over their reservations and all persons within them. Congress has guaranteed these powers to the tribes. Only Congress rightfully can restrict them, South Dakota's Attorney General to the contrary notwithstanding. The Court of Appeals correctly upheld tribal exercise of legitimate powers.

However, Petitioners appear to assert that tribes possess no powers not expressly conferred upon them by Congress or, at least, that Congress has terminated the powers at issue. Reduced to essence their theory seems to be that the Suquamish have ceased to exist as a real tribe, that Port Madison has suffered a *de facto* diminishment of its reservation status, and that the non-Indian, having achieved numerical majority, must be the paramount political entity on the reservation. This approach is not supported in the law or the operative theory of Indian relations, and in any event would be limited to Suquamish facts.

Petitioners' various contentions, if accepted in any significant part, would restrict severely the ability of tribes to legislate generally for their reservations to assure public order and safety, and to protect reservation resources.

The dissent below and *amicus* South Dakota focus upon the dearth of decisions and create a supposed "common understanding" (in a muddled situation) precluding tribal jurisdiction over non-Indians. The sense of puzzlement tincturing those legally unsup-

ported views will be relieved by a more thorough look at the history of Indian and federal sovereignties which, we will show, has been marked variously by practical cooperation, harrassment, and recently, by mutual respect—a course this Association strives to maintain.

We hope the information gathered herein, although *dehors* the record, will assist the Court in arriving at an understanding of how tribal courts function and the problems they and the tribes face. Our information is neither perfect nor complete but indicates that tribes possess the capacity of administering justice fairly and responsibly without regard of race.*

SUMMARY OF ARGUMENT

Long before European settlement of North America, Indian tribes were independent, self-governing nations. They survive today, retaining those sovereign powers that have not been abrogated by treaty or acts of Congress, even though for a time those powers were to a degree lost sight of, or rendered difficult of exercise, by military might. This legal retention of sovereignty, includes the power to enact criminal laws and to apply them to all persons within the territorial jurisdiction of the tribes. No treaty or statute has ever divested the Suquamish Tribe or its court of this attribute of sovereignty. The Tribe's exercise of that sovereignty over Petitioners for violation of tribal law, on tribal trust lands in the case of Oliphant, and within the reservation in the case of Belgarde, are valid.

* The undersigned, as counsel for NTCA, circulated questionnaires, App. B, from which the table at p. 42 was built. We believe the returns to be honest but they are incomplete. We do not have resources to go further.

It is clear also that the tribal court's action has been authorized by Congress. The tribe is organized under a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1970), and approved by the Secretary of the Interior. The court was established and its jurisdiction in the present case exercised under authority of valid tribal legislation.

An historical review of Indian self-government, in particular of their judicial systems, confirms the view that modern tribal courts indeed are exercising the original sovereign powers of the tribes; further, that tribal authority over non-Indians within reservations or trust lands, generally held quiescent for many years by military, political and economic realities, nevertheless, survives. Indian tribes today are asserting jurisdiction over non-Indians to a limited extent calculated to meet the necessities of reservation life and government. Such exercise of authority, though not extensive, is important to the preservation of reservation peace and security, the protection of natural resources, and tribal dignity. And its exercise constitutes no radical departure from any "common understanding" that can be supported on the factual record.

It is clear that tribal assertion of this limited jurisdiction furthers the established congressional policy of securing Indian self-determination through the development of capable tribal governments. From the tribal perspective, the principle consistently followed by this Court that Indians have the right to make their own laws should be sustained and construed to include the ability of Indian society to protect itself against the depredations of either Indian or non-Indian.

It should not be forgotten that tribal courts are not courts of last resort. Due process is guaranteed by the Indian Civil Rights Act to all who come before these tribunals. Federal habeas corpus is available to any who might be treated unfairly.

We therefore urge that the Court affirm the decisions of the lower courts.

At the same time we recognize, from the presentations of other participants in this case and our own efforts, that both sides have deemed it necessary to supplement the record considerably. Accordingly, we recognize that, should the Court desire to depart from the cold legal history of this country's relations with the original sovereigns of this land and consider the social significance of tribal courts to this nation, it may feel it appropriate that certiorari be vacated and the writ be dismissed as improvidently granted because of an inadequate record.

ARGUMENT

I. THE SUQUAMISH TRIBE PROPERLY EXERCISED JURISDICTION OVER PETITIONER BY AUTHORITY OF TRIBAL AND FEDERAL LAW.

The Court should affirm the result and reasoning of the Court of Appeals in *Oliphant* v. *Schlie,* 544 F.2d 1007 (1976). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory.*" *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832); *United States* v. *Antelope,* —— U.S. ——, 97 S.Ct. 1395, 1398 (1977); *United States* v. *Mazurie,* 419 U.S. 544, 557 (1975) (emphasis added).

One of the original attributes of sovereignty of the Suquamish and all tribes was the power to apply its law to all persons within its territory. This Court's statement in *Williams* v. *Lee,* 358 U.S. 217, 220 (1959), that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive" is consistent with the basic proposition. The Ninth Circuit's analysis in the present case that original or inherent tribal powers are preserved under federal law unless expressly divested by the tribe or extinguished by Congress reflects the historically, legally correct view.[7] *See* 544 F.2d at 1009-10. There exists no statutory or treaty obstacle to tribal jurisdiction in the present case. Therefore it follows that the Suquamish Tribe possesses jurisdiction to try Oliphant and Belgarde, non-Indians, for their alleged violations of tribal law occurring on tribal trust land in the former case and on both trust and fee lands within the reservation in the latter.[8]

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[7] Various federal courts have relied upon this basic proposition. *See Tom* v. *Sutton,* 533 F.2d 1101 (9th Cir. 1976); *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976); *Ortiz-Barraza* v. *United States,* 512 F.2d 1176 (9th Cir. 1975); *Wounded Head* v. *Tribal Council of Oglala Sioux Tribe,* 507 F.2d 1079 (8th Cir. 1975); *Stone* v. *United States,* 506 F.2d 561 (8th Cir. 1975); *Kills Crow* v. *United States,* 451 F.2d 323 (8th Cir. 1971); *Groundhog* v. *Keeler,* 442 F.2d 674 (10th Cir. 1971); *Davis* v. *Littell,* 398 F.2d 83 (9th Cir. 1968); *Colliflower* v. *Garland,* 342 F.2d 369 (9th Cir. 1965); *Oliver* v. *Udall,* 306 F.2d 819 (D.C. Cir. 1962); *Native American Church of North America* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Barta* v. *Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

[8] The primary distinction between the two cases lies in the fact that while Oliphant was charged with an offense occurring on tribal trust lands, Belgarde's actions occurred at least partially, on a state highway within the reservation. J. App. 114. The Court of Appeals

It is unnecessary to restate Respondents' arguments. Counsel for the Tribe have ably presented its case. We endorse their analysis and conclusions. We would, however, like to explain and distinguish the one federal *nisi prius* case touted by Petitioners as a bar to tribal jurisdiction:

In *Ex parte Kenyon,* 14 Fed. Cas. 353 (No. 7720) (C.C.W.D. Ark. 1878), Judge Parker issued the dictum upon which Petitioners and opposing *amici* base their "common understanding" that Indian tribes cannot enforce their laws against non-Indians. Kenyon, a non-Indian U.S. citizen married to a Cherokee woman, resided in the Cherokee Nation for a number of years. Upon the death of his wife he moved to Kansas taking with him a horse of which he was in rightful legal possession but which had been owned by his deceased wife. *Id.* at 354-55. He sold the horse in Kansas, an act regarded by the Cherokee Nation as an unlawful conversion of his wife's property. Kenyon was convicted of larceny by the tribal courts and sentenced to five years imprisonment. He petitioned in federal court for a writ of habeas corpus challenging the jurisdiction of the Cherokee court.

The federal court's decision that the tribal court lacked subject matter jurisdiction because the offense had occurred outside Cherokee territory was dispositive and was so acknowledged by Judge Parker. *Id.* at 355. *See Elk* v. *Wilkins,* 112 U.S. 94, 108 (1884). The

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has not had an opportunity to rule upon whether this distinction bears upon the outcome of the *Belgarde* case. We submit that the result would be the same, however, since it is established that rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of tribal authorities. *Ortiz-Barraza* v. *United States,* 512 F.2d 1176 (9th Cir. 1975).

court proceeded to find also that the Cherokees lacked personal jurisdiction over Kenyon, primarily because he was no longer a domiciliary of their nation. *Id.* That would have been enough. But the court began its analysis of personal jurisdiction by asserting that "to give [the Cherokee] court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian." *Id.* Without discussion, the court cited Section 2146 of the U.S. Revised Statutes (1873), a statute nearly identical to the present 18 U.S.C. § 1152.*

That statute did not contain the language recited in Judge Parker's opinion. In fact Congress studiously avoided describing the United States' general criminal jurisdiction in Indian country as being exclusive. Judge Parker did not fathom the possibility that Congress might have intended simply to extend federal jurisdiction to the Indian country, where it had not previously existed, as a protective, peace-making device while preserving concurrent tribal jurisdiction and assuring exclusive tribal jurisdiction over offenses committed by Indians against Indians. This, we sub-

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* The section now reads:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

mit, is the more reasonable interpretation. Tribal and federal jurisdiction in fact clearly were concurrent for offenses by Indians against non-Indians with a tribal right of preemption expressly stated.

While application of the General Crimes Act was expressly made subject to treaty rights, Judge Parker did not consider the provisions of any treaty between the United States and the Cherokee which might have determined the question. For example, the Treaty of New Echota, 7 Stat. 478 (1835), secured to the Cherokees the right to make and enforce all laws deemed necessary for the "protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them." Art. 5, 7 Stat. 481. Arguably, this provision provided a basis for jurisdiction over the person of Kenyon. Yet it was not considered by the court even though apparently still in effect. *See Talton* v. *Mayes*, 163 U.S. 376, 380 (1896).[10]

[10] Judge Parker's inquiry into Cherokee jurisdiction was flawed from the start. It was premised upon his statement that if Kenyon was held by action of the Cherokee Nation without its having jurisdiction then he was held in violation of the Constitution, laws, and treaties of the United States. *Ex parte Kenyon, supra,* at 354. This Court subsequently held, however, that the Constitution could have no application to the actions of Indian tribal governments. *Talton* v. *Mayes*, 163 U.S. 376 (1896). Accordingly, it was incumbent upon Judge Parker to afford more attention to the applicable treaties and to Rev. Stat. § 2146. Moreover, if it was not clear in 1878, it is now that special criminal statutes relating to Indian country and the division of federal, tribal, and state jurisdiction are not based on the race of the offender but on the quasi-sovereign status of tribes over their reservations. *United States* v. *Antelope*, —— U.S. ——, 97 S. Ct. 1395, 1398-1400 (1977); *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976). Nor is jurisdiction over non-Indians precluded on grounds that non-Indians cannot participate in tribal government. *United States* v. *Mazurie*, 419 U.S. 544 (1975).

While any proper analysis of the present case must be premised upon recognition of the inherent sovereignty of the tribe, we also find firm support for Suquamish jurisdiction in this case in affirmative acts of Congress and the Executive Branch.

The Suquamish Indian Tribe is a federally-recognized tribe organized under the Indian Reorganization Act, 25 U.S.C. § 476 (1970), and governed by a constitution and by-laws approved on July 2, 1965, by the Undersecretary of the Interior. Mem. Op. (W.D. Wash., Apr. 5, 1974), J. App. at 49; Respondents' Brief for Opposition to Certiorari, p. 5. In 1973, in accord with its constitution, the Tribe, by referendum, adopted a law and order code and established its tribal court and police system pursuant to that legislation. Under the tribal constitution the code was not required to be approved by the Secretary, but it is regarded by the Department of the Interior as valid legislation. Brief for the United States at 4-5. Petitioner was charged with violation of this Code and was subjected to the jurisdiction of the tribal court. These facts plainly indicate firm congressional and executive authority for the jurisdiction in question.

This Court held recently in *United States* v. *Mazurie*, 419 U.S. 544 (1975), that tribal law could be applied to non-Indians for criminal violations. There the Court upheld the conviction of two non-Indians for unlawfully introducing liquor into Indian country. The statutes violated, although federal in origin, 18 U.S.C. § 1154 (1970), delegated federal regulatory authority to the tribes. *Id.* § 1161. The Wind River Tribes, pursuant to that delegation, enacted an ordinance requiring retail liquor outlets within the reservation to ob-

tain a tribal license. 419 U.S. at 548. After a tribal hearing, defendants failed to obtain the required license but chose to operate their establishment in contravention of tribal law. Prosecution of the offense was federal, but the law violated was tribal. Defendants contended, and the Court of Appeals stated, that it failed "to see how such an association of citizens (the Tribe) could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization." *United States* v. *Mazurie,* 487 F.2d 14, 19 (10th Cir. 1973). Rejecting such arguments this Court held:

> . . . [W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority . . . .

419 U.S. at 557. Congress, through the Indian Reorganization Act, and the Secretary of the Interior, by reason of his general power to disapprove tribal legislation have, in effect, delegated to the Suquamish Tribe the power to enact and enforce its criminal code over all persons within the reservation.

II. INDIAN TRIBAL COURTS HAVE EVOLVED IN ACCORD WITH FEDERAL LAW AND POLICY AS IMPORTANT INSTRUMENTS OF TRIBAL SELF-GOVERNMENT. THEIR HISTORY REFLECTS NO GENERAL ABROGATION OF CRIMINAL JURISDICTION OVER NON-INDIANS.

Tribal courts have evolved as vital manifestations of the retained powers of self-government of federally-recognized Indian tribes. Such governmental powers as the tribes originally possessed within their territory were never ceded by the tribes or withdrawn by superior authority despite a long history of military, political and economic subjugation of the tribes.

South Dakota asserts that the 100-year dormancy of the question of tribal jurisdiction over non-Indians contributed to a "common understanding" that such exercise had been condemned. Brief for South Dakota at 3. While dormancy generally is unquestioned, history shows that the issue was regarded not as foreclosed, but as unclear. History in the last 200 years has not been particularly kind or consistent for the Indian people, and it would indeed be tragically mistaken if modern authority were to find that basic rights once held have been abrogated through the sheer force of their suppression.

The colonial period in America was marked by persistent warfare between the tribes and the various European powers. Violations of Indian customary law by non-Indians, if grievous enough, commonly resulted in military forms of retaliation rather than judicial sanction. *See* REID, A LAW OF BLOOD (1970). As the balance of power shifted toward the colonies, however, the eastern tribes were forced either to move beyond the frontier or seek a workable peace. Coexistence required that mechanisms other than war be found to

prevent and punish non-Indian offenses against the tribal peace, and the tribes typically were content to let the British punish their own and to receive economic compensation for wrongs against the tribe. *Id.* at 126; REID, A BETTER KIND OF HATCHET 176-77 (1976). To construe such political, pragmatic efforts at peace as a conscious surrender of jurisdiction in the sense of Anglo-Saxon common law would, of course, strain the contemporary concepts prevailing on both sides."[11] There is evidence for example, that the British, for their part, disdained exercise of jurisdiction over their own subjects in Cherokee territory where the Tribe had made clear it would not stand for the intrusion and consequent threat to the harmony of their Nation. Letter from Ludovic Grant to Gov. James Glen, May 3, 1752, 2 INDIAN BOOKS 261-62.

A. The Treaty Period

Many of the earliest treaties of the United States with Indian tribes clearly preserved the judicial authority of the signatory tribe, in whole or in part, as against both state and federal governments. The Delaware Treaty of 1778, 7 Stat. 13, provided that "for the better security of the peace and friendship" between the parties, neither the United States nor the Delawares "shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender . . . , till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting

[11] Indeed, the Northwest Ordinance, 1 Stat. 50, 52 (1789), indicated that the fledgling Congress would make laws regarding Indians for the purpose of "preventing wrongs being done to them, and for preserving peace and friendship with them."

parties, and natural justice . . . . *Id.* art. 4; *see Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 550 (1832). The jurisdiction of the parties to this first treaty was, in effect, concurrent. Subsequent treaties, however, recognized exclusive tribal jurisdiction over most crimes. The Treaty of 1785 with the Cherokees, 7 Stat. 18, provided in Article V that any citizen of the United States settling in the lands reserved by the treaty to the tribe "shall forfeit the protection of the United States, and the Indians may punish him as they please." *Id.* at 19. *See also* Treaty of 1785 with the Wiandot, 7 Stat. 16, art. V. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146, n. 212 and treaties cited therein, 364 (U.N. Mex. 1971) [hereinafter cited as COHEN]. Such provisions for tribal punishment of non-Indians for offenses committed in the Indian country followed the practice of international treaty making. COHEN 364.

Both the Cherokee and Wiandot treaties, however, also contained a measure of federal assumption of juridical authority. The tribes agreed to "deliver up" to the United States for punishment any Indian or other person residing among them committing any capital crime upon a U.S. citizen.[12] Art. VI, 7 Stat. 19; Art. IX, 7 Stat. 17. In construing this Cherokee treaty and, in particular, the Tribe's general acknowledgment of the protection of the United States, Justice Marshall relied upon the British practice in treaty-making and the Indians' understanding of it. "The strong hand [of the European powers] was interposed

[12] Secretary of War Henry Knox recommended this relationship to President Washington in 1789. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 145 (Comm. print 1977) [hereinafter cited as AIPRC, FINAL REPORT].

to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832). "The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them." *Id.* There was no surrender of national character involved. *Id.*

Later treaties commonly provided for the delivery of white offenders to federal authorities, *e.g.*, Treaty of 1789 with the Six Nations, 7 Stat. 33, 35, and the original Trade and Intercourse Act of 1790, 1 Stat. 137-38, as well as its subsequent enactments, provided for federal jurisdiction over non-Indians charged with crimes against Indians in Indian country. *See* COHEN 364. Such provisions of law reflected the federal government's policy of imposing itself as a buffer between the tribes and the "unprincipled white men" who were perceived as posing the greatest threat to the tribes and to the peace of the frontier. *See* TASK FORCE FOUR, AMERICAN INDIAN POLICY REVIEW COMM'N, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 90 (1976).

This Court spoke definitively with respect to federal Indian relations in 1832 in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515. There the Court stated:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power. . . .

Id. at 559. The Cherokees, the Court held, had never through their treaties surrendered their right to self-government. *Id.* at 561. The Cherokee Nation occupied its own territory in which the criminal laws of the State of Georgia could have no force. *Id.*

Congress, in 1834, evidenced this same view. The congressional report accompanying the legislation later known as the General Crimes Act, see note 9, *supra*, stated:

> It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is retained principally on the ground that it may be unsafe to trust to Indian Law *in the early stages of their government.*

H. R. REP. No. 474, 23d Cong., 1st Sess. 13 (1834) (emphasis added). Tribal criminal jurisdiction, to the extent it had not been expressly relinquished or subjugated to other authority, was viewed by Congress and the Supreme Court as paramount. Federal jurisdiction was supplementary. Thus, the General Crimes Act extended the criminal laws of the federal government to Indian country with the express exception of crimes committed by one Indian against the person or property of another Indian.[13] There was

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[13] Section 25 of the Trade and Intercourse Act of 1834, 4 Stat. 729, 733 read as follows:

> *And be it further enacted;* That so much of the laws of the United States as provides for the punishment of crimes com-

no express or implied intent to make such federal jurisdiction exclusive or to withdraw concurrent jurisdiction from the tribes.

B. The Reservation Period.

Traditional systems of tribal justice survived well into the 19th Century. Judicial authority in tribal society typically was vested in communal councils composed of the chiefs or elders and was founded upon principles of community consensus and theology. *See* AIPRC, FINAL REPORT, *supra* note 12, at 161-62. Some tribes, such as the Cherokees, others of the Five Civilized Tribes, and the Senecas adopted European styled institutions, including courts, at relatively early dates. *Id.* at 162; Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 970 (1972). But the Nineteenth Century, including the relentless westward removal of tribes, persistent warfare, and confinement to reservations witnessed the near-decimation of tribal society, and, consequently, many of the traditional forms of Indian self-government. AIPRC, FINAL REPORT, 161-62.

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mitted within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Later, the language was added specifying that:

> The preceding section shall not be construed to extend to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case where by treaty stipulations, the exclusive jurisdiction over such offense, is or may be secured to the Indian tribes respectively.

10 Stat. 270 (1854).

An 1855 opinion of the Attorney General is particularly interesting at this juncture. 7 Op. Att'y Gen. 174 (1855). Where a non-Indian had married into and resided in the Choctaw Nation he was held to be subject to the civil, but not the criminal, jurisdiction of the tribal courts. Criminal jurisdiction did not exist because the treaty of Dancing Rabbit Creek had precluded it even though the question had been negotiated. *Id.* at 179. The Attorney General, however, stated very clearly:

> . . . [I]t is certain that the Agent errs in assuming the legal impossibility of a citizen of the United States becoming subject, in civil matters, or criminal either, to the jurisdiction of the Choctaws.

Id. at 177. Tribal civil jurisdiction existed because Congress had never taken it away. *Id.* at 180.

The federal policy in mid-century was directed toward civilizing and assimilating the Indian, and imposition of western law on the reservation was seen as a primary agent of this process. A prominent cleric advised President Lincoln "[The Indian] cannot live without law. We have broken up, in part, their tribal relationships, and they must have something in their place." *See* AIPRC, FINAL REPORT 162. In 1877, the Commissioner of Indian Affairs concurred in this sentiment, reporting:

> Civilization has loosened, in some places broken, the bonds which regulate and hold together Indian society in its wild state and has failed to give people law and officers of justice in their place.

BUREAU OF INDIAN AFFAIRS, ANNUAL REPORT 2 (1877).

As a result of the need for law and order on the reservation and as a manifestation of a continuing struggle for reservation control between civilian and military authorities, federal Indian agents began to create their own Indian police forces responsible directly to the agents. *See generally* BUREAU OF INDIAN AFFAIRS, INDIAN LAW ENFORCEMENT HISTORY (1975). In some cases courts were established, often with the Agent sitting as judge. *Id.* at 23. The federal motive was not necessarily to foster tribal self-government. In 1881, Commissioner of Indian Affairs Price reported that his new police and court system "weakens and will finally destroy, the power of tribes and bands." *See* AIPRC, FINAL REPORT 162. Nevertheless, the tribal right of self-government was not extinguished by Congress.

In 1883, the Commissioner first promulgated rules to govern the newly-founded Courts of Indian Offenses. BUREAU OF INDIAN AFFAIRS, LAW ENFORCEMENT HISTORY 23 (1975). The rules were directed against such practices as sun dancing and polygamy, and the Indian agents were directed to appoint leading tribesmen to sit in judgment of these and other crimes. *Id.; see Colliflower* v. *Garland,* 342 F.2d 369, 372 (9th Cir. 1965). Congress that same year, by statute, charged the Commissioner, under the direction of the Secretary of the Interior, with the "management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2 (1970); *see Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89, 95 (8th Cir. 1956). This general grant of authority subsequently was held to authorize the Commissioner to establish rules of government for the reservation, including the creation of Indian police and Courts of

Indian Offenses. *United States* v. *Clapox,* 35 F. 575 (D. Or. 1888). These courts were regarded at the time as institutions for the discipline and education of the Indian into the "habit and knowledge of self-government." *Id.* at 577, 579.

The Indian Department Appropriations Act of 1888, 25 Stat. 217, 233, carried the first congressional provision for funding of the Indian courts, and Congress has made such appropriations for reservation law and order continuously since that time. *See Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89, 95 (8th Cir. 1956). Specifically, the Bureau of Indian Affairs Authorization Act in 1921 provided that the BIA shall "direct, supervise, and expend such moneys as Congress might appropriate, for [*inter alia*], the employment of . . . Indian police [and] Indian judges," 25 U.S.C. § 13 (1970), and substantial federal expenditures are made today under that authority.[14]

The continuing, undiminished sovereignty of the tribes in criminal matters involving their own citizens was affirmed by this Court in 1883 in *Ex parte Crow Dog,* 109 U.S. 556. Crow Dog was tried, convicted, and sentenced to death in federal court for the murder of Spotted Tail, a fellow tribesman, in Indian country. Crow Dog challenged the jurisdiction of the federal court and the case reached the Supreme Court. There Mr. Justice Mathews stated that the treaties with the Sioux Tribes had pledged to secure to the Indian an "orderly government." 109 U.S. at 568. The very purpose of all of these arrangements was to introduce and naturalize among them self-government, "the regulation by themselves of their own

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[14] See p. 47, *infra*.

domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." *Id.* Congress had never assumed jurisdiction over the crime of murder by one Indian of another, and Crow Dog thus was not subject to the jurisdiction of the federal court. He was released to be dealt with according to tribal law which required only economic support of the victim's family.

The public clamor arising over the *Crow Dog* case resulted in the passage in 1885 of the Federal Major Crimes Act. 23 Stat. 362, 385. By this Act, now codified at 18 U.S.C. § 1153 (1970), the United States purportedly assumed exclusive jurisdiction over specified major offenses committed by Indians against the person or property of other Indians.[15] The Crow Dog affair indicated the necessity for clear congressional action where original tribal powers were to be modified.

By 1890 courts of Indian offenses existed at two-thirds of the agencies, but federal authorities regarded the jurisdictional status of these courts as unclear. AIPRC, FINAL REPORT 162-63. As discussed above, in 1878 Judge Parker erroneously had interpreted the General Crimes Act to bar the courts of the Cherokee Nation from exercising criminal jurisdiction over a non-Indian. *Ex parte Kenyon,* 14 F. Cas. 353 (No. 7720) (C.C. W.D. Ark.). Non-Indians, nevertheless, posed some of the principal problems faced by Indian courts and police. AIPRC, FINAL REPORT 163. Indian court jurisdiction over whites, mixed-

[15] Those crimes now include murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny. 18 U.S.C. § 1153 (1970).

blood Indians, and allottees was challenged periodically, but the Department of the Interior consistently chose to avoid such test cases. AIPRC, FINAL REPORT 163; HAGAN, INDIAN POLICE AND JUDGES 145-46 (1966).

C. Revitalizing Tribal Governments.

For many years tribal governments foundered under federal assimilation policies directed to the disintegration of the tribal land base and the teaching of western acculturation.[16] In 1934, Congress abruptly broke with this policy and passed the Indian Reorganization Act (IRA). 25 U.S.C. §§ 461-79 (1970). The IRA was aimed primarily at halting erosion of the Indian land base and revitalizing tribal governments. *Fisher* v. *District Court,* 424 U.S. 382 (1976); *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 151 (1973); *see* AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS 22 (1977) [hereinafter cited as SURVEY OF TRIBAL COURTS]. Under Section 16 of the IRA, 25 U.S.C. § 476 (1970), Indian tribes were authorized and encouraged to adopt new constitutions and by-laws incorporating the powers vested in tribes under existing laws plus other powers enumerated in the Act. *Id.*

The creation or restoration of tribal courts under the IRA to replace the departmental Courts of Indian Offenses ("CFR courts") was contemplated from the beginning. The Solicitor of the Department of the

[16] The General Allotment Act, 24 Stat. 388 (1887), was designed to civilize Indian people by granting individual interests in land to Indians in order to promote adoption of an agrarian lifestyle. The Act resulted in the loss to tribes of some 90,000,000 acres. *See Note, Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955, 959-60 (1972).

Interior rendered a lengthy opinion in 1934 stating that the powers of an Indian tribe to administer justice on the reservation derived from the tribe's sovereign powers of self-government. 55 I.D. 14, 56 (1934). In all fields in which the tribe could legislate it necessarily possessed coextensive power "to adjudicate through tribunals established by itself." *Id.*

The Solicitor further recognized that the original criminal jurisdiction of the tribes had never been transferred to the States. *Id.* at 57. Under existing law, the States had jurisdiction over some acts of non-Indians on the reservation (citing *United States* v. *McBratney,* 104 U.S. 621 (1881), *id.* at 58; but that did not include crimes involving either an Indian offender or victim. *Id.* at 60-61. Tribal authority over "minor" crimes of Indian against Indian was plenary, and the Solicitor regarded federal jurisdiction over the statutory major crimes as exclusive. The Solicitor, however, regarded as "not clear" the question of whether offenses such as disorderly conduct or simple assault, when committed by a non-Indian against an Indian in Indian country, could be prosecuted in federal court. *Id.*

In 1934, most tribes had little or no experience with constitutional government, and they naturally looked to the BIA for assistance in reforming their governments. See SURVEY OF TRIBAL COURTS, *supra* p. 27 at 23; Note, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955, 968-69 (1972). The BIA responded by proffering standard constitutions which became the basis of most tribal governments and which generally authorized the tribal council to create tribal courts and to enact law and order codes. *Id.* at 24-25. All IRA constitutions and

amendments thereto must be approved by the Secretary of the Interior. 25 U.S.C. § 476 (1970).

The Department of the Interior promulgated amended regulations for the Courts of Indian Offenses in 1935 which provided that the rules applicable to its "CFR courts" should apply "until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective." *See* 25 C.F.R. § 11.1(d).

The CFR courts represented the only familiar judicial model for most tribes so that even those tribes electing to create their own courts under the IRA adopted the existing federal regulations, sometimes verbatim, as the basis of their law and order codes. SURVEY OF TRIBAL COURTS 25-27. The pervasive influence of the Department of the Interior and the 1934 Solicitor's Opinion thus had a marked impact upon the development of tribal constitutions and judicial systems. The 1935 regulations restricted the jurisdiction of the CFR courts to offenses committed by Indians within the reservation. 25 C.F.R. § 11.2(a) (1976). Where federal or state law applied, the jurisdiction was concurrent. *Id.* § 11.2(b). Following this federal model, most tribes chose the same pattern, adopting constitutions and enacting legal codes which limited tribal criminal jurisdiction to Indians."[17] SURVEY OF TRIBAL COURTS 28. Thus the uncertainty that had beset the Interior Department, much of it stemming from the *Kenyon* dicta, determined the tribes' jurisdictional perspective.

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[17] Civil authority over non-Indians extended to plaintiffs and to consenting defendants. SURVEY OF TRIBAL COURTS 28.

Tribal courts underwent little real development after the initial formative period owing chiefly to the more pressing demands of land and economic issues and the return of Congress to policies favoring termination and assimilation. *Id.* at 30-32. In 1953, over strong but unheeded tribal opposition, Congress passed Public Law 280,[18] conferring upon five specified states [19] all criminal and civil jurisdiction over reservation Indians. Other states were given the option of assuming such jurisdiction by their unilateral action, and several states chose to do so at least in part. This process of jurisdiction transfer was effectively halted in 1968 when Congress provided that from that time forward the consent of the affected tribe to state assumption of jurisdiction would be required. 25 U.S.C. §§ 1321-22 (1970).[20]

That same year signalled renewed congressional focus upon tribal justice systems. After some seven years of study and hearings by Senator Ervin's Senate Subcommittee on Constitutional Rights, Congress passed the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* (1970), which applied certain guarantees of individual rights styled after the federal Constitution to Indian tribes "exercising powers of self-government." *Id.* § 1302. The Act expressly recognized that tribal powers of self-government included judicial, as well as legislative and executive powers, and that the

[18] 67 Stat. 588-90, now codified as 18 U.S.C. § 1162 (1970), 28 U.S.C. § 1360 (1970); *see* 25 U.S.C. §§ 1321-22 (1970).

[19] California, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconsin (except Menominee). Alaska was added to this category in 1958. Pub. L. 85-615.

[20] Additionally, the law provided for federal acceptance of state retrocession of all Pub.L. 280 jurisdiction. 25 U.S.C. § 1323 (1970).

judicial power was exercised through both tribal courts and courts of Indian offenses. 25 U.S.C. § 1301(2), (3) (1970). The constitutionally patterned rights, moreover, were guaranteed to "*any person,*" not just to Indians. The implication is clear that Congress contemplated the appearance of non-Indians before tribal tribunals.

The federal view of tribal criminal jurisdiction wavered in the early 1970's. In 1970 the Interior Department Solicitor issued Opinion No. M-36810 in which he concluded that Indian tribes generally do not possess criminal jurisdiction over non-Indians unless such authority is expressly retained under a surviving treaty provision as provided in 18 U.S.C. § 1152. 77 I.D. 113 (1970). The Solicitor's Opinion was based on Judge Parker's 1878 mistaken dicta in *Kenyon* [21] and an unsupported conclusion that 18 U.S.C. § 1152 withdraws all general criminal jurisdiction from the tribes. That Opinion was officially withdrawn in 1974 and, therefore, no longer represents the Department's position. *Oliphant* v. *Schlie,* 544 F.2d 1007, 1011 n. 5 (9th Cir. 1976).

Tribal courts exist today as manifestations of the original inherent powers of self-government of all Indian tribes. *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). While tribal judicial authority historically has deteriorated from time to time in accord with the vascillation of federal policy toward the Indian, Indian judicial systems survive and are encouraged today under congressional and executive authorization and approval. No event of history nor any act of Congress abolished generally the original right of

[21] See pp. 12-14, *supra*.

the tribes to impose their law upon all persons within their territory without regard to race. The uncertainties of tribal authority that have existed arose from the pragmatism of war and political power of a bygone age, not in the laws of this country.

III. TRIBAL EXERCISE OF CRIMINAL JURISDICTION OVER NON-INDIANS FOR ON-RESERVATION VIOLATIONS OF TRIBAL LAW IS NECESSARY TO THE PRESERVATION OF RESERVATION ORDER AND FURTHERS THE PREVAILING FEDERAL POLICY OF DEVELOPING STRONG TRIBAL GOVERNMENTS.

A. Petitioners' and *Amici's* Arguments Based on the Size and Capacity of the Suquamish Tribe Ignore the Complexity of Indian Country and the Broad Applicability of the Ruling They Seek.

Amicus South Dakota characterizes the decision in *Oliphant* as representative of the "fast pace of change in Federal Indian policy" and of a threatened breach of status quo. Their alliance of Attorneys General suggest that the Suquamish exercise of jurisdiction is something radically new, an isolated event that portends disruption of an age-old balance. This is an inaccurate portrayal of the present situation.

Petitioners and *amici,* especially Kitsap County, would cast further doubt upon the validity of the Suquamish Tribe's law enforcement by referring to the size of the tribe, 50-173 members, its percentage of the total Port Madison population, 1.7 to 5.8 percent, and the large non-Indian land base, about 63 percent. Brief for Attorney General of Washington at 2-3; Brief for Petitioners at 8-9. Washington's Attorney General gratuitously and inaccurately asserts that Port Madison is reasonably typical of the reservations in

that state. Brief at 2. Between these parties they conclude the Suquamish have not had a tribal community at Port Madison for some time. Brief for Petitioners at 9. Kitsap County believes the Suquamish Court to be suspect, citing lack of experience with various types of proceedings, standards for judicial and jury qualification, lack of facilities and the like. Brief for Kitsap County at 18-19.

These opponents of the Suquamish would have the Court decide the broad issue of tribal jurisdiction over non-Indians in a vacuum of understanding of the true nature of Indian country. The incongruities between the legal issues presented and the factual context will be apparent to the Court. While other tribes of the size and land wealth of the Suquamish do exist it is not possible to regard Suquamish as typical of all tribes or tribal courts. The complexity and variety of tribal circumstance in matters such as reservation land base cannot be overstated.

Within the State of Washington alone there are five reservations with significantly larger land areas than Port Madison. See Appendix A to this Brief. Colville, for example, is over one million acres and is 92.7 percent tribally owned with a 63 percent Indian population. *Id.* at 5a. Many of the Washington reservations are primarily allotted, but allotted land cannot be presumed to be non-Indian. Quinault, for instance, is almost 98 percent allotted but its non-Indian population is only about 20.8 percent. *Id.* The Arizona reservations will be equally affected by the Court's decision. Many of those reservations are wholly owned by the tribes or else are relatively unallotted. Typically, the non-Indian populations of those reservations is low,

from about 3 to 10 percent. *Id.* at 1a. In some cases large non-Indian populations live within reservations that are almost totally owned by the tribes (*e.g.*, Colorado River). *Id.* South Dakota presents intermediate situations with tribal land holdings ranging from 100 to 75 percent at one end of the scale to one or two percent at the other; the total non-Indian, on-reservation population would be about 59.2 percent.

To the extent Petitioners and *amici* suppose that Port Madison is a non-Indian community and that that conclusion, if true, should have legal weight, they are misdirected. In essence, they argue a *de facto* termination of the tribe and diminishment of the reservation. Their facts and conclusions, however, are not found upon the record. And this Court, in any event, has made clear that reservation boundaries and legal status remain intact unless clearly dismantled by Congress. *Rosebud Sioux Tribe* v. *Kneip*, —— U.S. ——, 97 S. Ct. 1361, 1363 (1977). Moreover, 28 U.S.C. section 1151 establishes that Indian country includes fee patented lands within the reservation.

B. Tribal Courts Are Exercising Jurisdiction Over Non-Indians To A Reasonable Extent Dictated By The Need to Maintain Orderly, Safe Reservations.

Today approximately 127 [22] reservation court systems operate in the United States exercising jurisdic-

[22] This total was compiled by NTCA counsel from the following sources: National American Indian Court Judges Association, Operational Reservation Indian Court Services (as of 3-18-77) (hereinafter cited as Operational Court Services); SURVEY OF TRIBAL COURTS p. 27 *supra*; Letter from Hans Walker, Assistant Solicitor, Division of Indian Affairs, Department of the Interior to H. Bartow Farr, Assistant to the Solicitor General, May 20, 1977 (hereinafter cited as Walker Letter).

tion in criminal, civil, and conservation cases. This figure reflects growth of over 49 percent since 1973. AIPRC, FINAL REPORT 163. Of the current total, 71 are tribal courts, established and functioning pursuant to tribal legislative powers with written codes; 30 exist and operate under the Code of Federal Regulations, 25 C.F.R. part 11 (1976); 16 are traditional courts of the New Mexico pueblos; and ten are solely conservation courts. *See* Operational Court Services, *supra*. Our immediate concern is with the 71 tribal courts, most of which are created under the authority of the Indian Reorganization Act. 25 U.S.C. § 476 (1970).

In 1973, Indian tribal courts handled approximately 70,000 cases [23] and the caseload has grown markedly since, to an estimated minimum 85,000 in 1975.[24] Well over 70 percent of the total court caseload for most tribes consists of criminal matters, primarily misdemeanors such as simple assault, disorderly conduct, and public intoxication, with the balance of criminal matters composed chiefly of traffic and juvenile offenses.[25] SURVEY OF TRIBAL COURTS 47.

Crime constitutes a problem throughout much of Indian country. The BIA has reported that in 1975 there were 94,424 criminal offenses in Indian country reflecting a crime rate 4.5 percent greater than for rural America. DIV. LAW ENFORCEMENT SERVICES, BUREAU OF INDIAN AFFAIRS, THE COMBINED TRIBAL AND

[23] AIPRC, FINAL REPORT 163-64.

[24] Counsel's tabulation based on the figures reported in SURVEY OF TRIBAL COURTS.

[25] This figure based on both adult and juvenile offenses.

BUREAU OF LAW ENFORCEMENT SERVICES: ANNUAL REPORT 28, 43 (1975). The rate for violent crime, however, was nearly 520 percent greater and increasing. *Id.* at 28. The overall increase in the crime rate was 16.6 percent over 1970. *Id.* at 29.

Non-Indians increasingly are a part of this problem. As noted above, many Indian reservations, particularly those in the Pacific Northwest and the Great Plains states have substantial non-Indian populations, *see* Appendix A, owing principally to past federal policies of opening Indian lands to non-Indian settlement. In contrast, the reservations of the Southwest typically have non-Indian populations of near-zero to about 10 percent.[26] The huge Navajo reservation, for example, with a total population of nearly 133,000 is only about 5.5 percent non-Indian. *See* Appendix A. Such figures, of course, do not account for significant transitory non-Indian populations. The nature and extent of non-Indian reservation crime thus varies widely throughout the country.

Bureau of Indian Affairs arrest data compiled for the first half of this year show that nearly 300 non-Indians have been arrested by tribal and/or BIA authorities on reservations throughout the country for a wide range of non-traffic criminal offenses.[27] This number represents about 2.1 percent of total arrests. *Id.* On many reservations, however, traffic offenses bring significant numbers of non-Indians before the tribal courts.

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[26] Population figures are based on 1976 BIA estimates.

[27] BUREAU OF INDIAN AFFAIRS, TRIBAL AND BUREAU OF LAW ENFORCEMENT SERVICES AUTOMATED DATA REPORT, JAN. 1, 1977 TO JUNE 30, 1977. This total excludes 28 reservations which did not report and includes both adult and juvenile arrests.

The high incidence of reservation crime is not being addressed by state and federal authorities. Recent studies indicate that with regard to major crimes, U.S. attorneys declined to prosecute 80 percent of the cases presented to them. AIPRC, FINAL REPORT 196. A 1975 Justice Department Task Force reported that, while they could find no systematic discrimination in Indian cases, U.S. Attorneys in fact declined 75 percent of the cases presented to them. U.S. DEP'T OF JUSTICE, REPORT OF THE TASK FORCE ON INDIAN MATTERS 45-46 (1975). Many declinations are in favor of tribal jurisdiction, but there remain serious problems with federal enforcement nevertheless and the persistence of jurisdictional uncertainties contributes heavily to the situation. *Id.* at 16. The Justice Department Task Force found that federal prosecution of Indian offenses is slow and uncertain and success difficult to obtain. *Id.* at 41, 46. Indian cases were described as being minor and ill-suited to the federal court system. *Id.* at 41. Our experience and the Task Force Report support the observations of the Ninth Circuit in *Oliphant* that federal prosecutors are reluctant to proceed against non-Indians for minor offenses in crowded courts, where litigation costs will run high, and where success means imposition of only a small fine or a suspended sentence. 544 F.2d at 1013. Similarly, and notwithstanding the protests of Kitsap County, Brief at 11-17, state and county prosecutors show the same reluctance where their jurisdiction is unclear and where they perceive little stake in the outcome. *Id.* at 1013-14. We concur with the Ninth Circuit that a major factor contributing to the tribal law enforcement problem is the persistence of anti-Indian prejudice in many areas. *Id.* at 1013.

The result of this federal and state reluctance is that non-Indian offenses against tribal and/or federal law go unpunished. The Justice Department Task Force, *supra,* concluded that "federal practices and standards applied in determining declinations in Indian cases have created a serious problem for the overall maintenance of law and order on reservations," *id.* at 49, and recommended development of tribal courts and revision of tribal codes as an important part of the solution, stating:

> A strong, competent tribal court system is an essential element in attaining effective reservation law enforcement. While federal performance in the prosecution of crimes in Indian country must be improved, the effects would not be significant absent a great emphasis on improvements in tribal court systems.

Id. at 58; *see id.* at 50.

In *Oliphant*, the Court of Appeals made clear that in the absence of Suquamish tribal police there would have been no law enforcement on the reservation. 544 F.2d at 1013. It is in response to the frequency and gravity of such jurisdictional and enforcement vacuums that Indian tribes, like the Suquamish, have acted in recent years to revise their law and order codes and to extend their jurisdiction to all persons within their reservations.

The Suquamish law revision is part of a larger, continuing trend among Indian tribes generated by the requirements of the Indian Civil Rights Act, increased jurisdictional conflicts among federal, state, and tribal authorities, particularly on allotted reservations, the high incidence of reservation crime, and the growing

capacity and determination of tribes to deal with their own criminal and civil problems. *See* SURVEY OF TRIBAL COURTS, *supra* p. 27, at 88.

Of the 98 tribes surveyed in 1976 by the American Indian Lawyer Training Program (AILTP), 43 said they desired revision of their constitutions and 15 were actually engaged in the revision process; 33 tribes were then revising their codes, while 37 expressed a need for code revision. *Id.* at 90. The tribal movement toward constitutional amendment and code revision has for many tribes included repeal of prohibitions against exercise of jurisdiction over non-Indians that originated in the early IRA years. The AILTP Survey identified 33 tribes exercising some measure of jurisdiction over non-Indians.[38] SURVEY OF TRIBAL COURTS, App. D. Others were in the process of effectuating the necessary internal changes to do so. *Id.* at 48. In addition, a BIA survey indicates that another 12 tribes have enacted ordinances permitting the assumption of jurisdiction over non-Indians, Walker Letter, *supra* note 22, making a total of 45 tribes possessing the potential for assertion of such authority. The trend toward tribal exercise of jurisdiction over non-Indians is a phenomenon born of practical necessity.

The experience of the Gila River Indian Community adjoining Scottsdale, Arizona is fairly indicative of the dimension of the problem and the rationale of the tribal response.[39] Gila River had a history of problems

[38] This figure does not include those tribes which exercise jurisdiction over non-member Indians but not over non-Indians or which exercise limited jurisdiction over non-Indians based on the individual's actual consent.

[39] Reported in NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, 4 JUSTICE AND THE AMERICAN INDIAN 52 (1974).

with violations of their law by outsiders. A cross-deputization agreement between county and tribal police had met with success, but, with election of a new county sheriff, the agreement was not renewed. Without county cooperation, the tribe was rendered virtually powerless to deal with non-Indian offenses such as vandalism, dumping, malicious mischief, and traffic violations. In 1972, the tribal council responded by enacting the first tribal implied consent ordinance in the nation. It provided that the tribal court thereafter would have jurisdiction over all offenses committed by any person within the reservation boundaries and, further, that all persons entering the reservation, adequate notice having been posted, would be deemed to have consented by implication to the jurisdiction of the tribal court.

The result nationally, we submit, has been a reasonable, proportionate, slowly growing, important application of tribal law to non-Indians. Complete information concerning the extent to which Indian tribes are asserting jurisdiction over non-Indians is not available, but it is apparent that Petitioners' cases are not unique. The AILTP Survey of Tribal Courts was able to compile a full breakdown of the caseloads of only eleven of the tribes exercising jurisdiction over non-Indians. These tribes handled a total of 12,791 cases in 1975 and 535 of them (4.2 percent) involved non-Indians. By far the majority (98.9 percent) of such non-Indian cases were criminal misdemeanors, traffic violations, or hunting and fishing violations. *See generally* SURVEY OF TRIBAL COURTS, App. D. See Table I.

TABLE I [30]

Reservation	Caseload				Cases Involving Non-Indians			
	Total	Crim.	Civ.	Other	Total	Crim.	Civ.	Other
Metlakatla	250	248	2	—	c. 12	12	—	—
Hopi	804	—	—	—	8	8	—	—
Gila River	1927	779	438	810	173	25	6	142
Ak Chin	220	200	20	—	20	20	—	—
White Mtn. Apache	3652	2821	66	765	156	1	—	155
Colorado River	2400	1500	900	—	100	100	—	—
Southern Ute	250	213	37	—	2	2	—	—
Fort Hall	1580	1468	10	—	15	15	—	—
Sisseton-Wahpeton	1065	896	365	—	5	5	—	—
Quinault	348	296	52	—	42	42	—	—
Lummi	295	245	5	—	2	2	—	—
	12,791	8,666	1,895	1,575	535	232	6	297

These eleven tribes have a total on-reservation population of 55,129, of whom 57.9 percent are Indian and 42.1 percent are non-Indian.[31] Another three tribes (San Juan Pueblo, Rosebud Sioux, and Port Gamble) reported a total of 69 cases in 1975 involving non-Indians but did not report their tribal court caseloads.

Table II shows the caseloads of those tribes which reportedly exercise jurisdiction over non-Indians but which did not report the number of cases involving non-Indians.

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[30] Column totals do not necessarily reconcile since tribes compile their statistics differently. Some includes traffic offenses in the criminal category.

[31] Based on 1976 BIA estimates.

TABLE II

Reservation	Caseload Crim.	Civ.	Other	Total
Papago	2372	238	—	2610
Hualapai	475	20	5	500
Salt River	571	170	—	741
Bay Mills	5	5	—	10
Cheyenne	c. 2720	—	—	3400
Blackfeet	c. 4900	—	—	7000
Crow Creek	c. 1100	80	—	1184
Cheyenne River	c. 1960	—	—	2940
Uintah-Ouray	c. 1400	—	—	1500
Swinomish	—	—	—	16
Colville	153	—	—	208
Nisqually	—	—	50	50
Suquamish	2	—	—	2
TOTAL	15,658	513	55	20,161

Counsel for NTCA have made their own survey to indicate the level of recent tribal judicial activity involving non-Indians. The results (annualized for comparative purposes) are compiled in Table III:

TABLE III

		Criminal			Civil		
	Total	Total	Non-Indian	% Non-Indian	Total	Non-Indian	% Non-Indian
Ak Chin	91	65	6	9.2	25	4	16.4
Bay Mills	46	36	22	61.1	5	0	0
Cheyenne River	1,999	1,480	30	2.0	519	37	7.1
Colorado River	1,711	1,583	916	57.9	128	54	42.2
Crow Creek	1,135	866	0	0	81	0	0
Makah	236	226	30	13.3	10	0	0
Quinault	206	182	37	20.3	24	4	16.7
San Juan	c. 630	N.A.	183	—	N.A.	6	—
Sisseton	614	447	12	2.7	158	0	0

The available information shows Indian tribes to be exercising jurisdiction over non-Indians to a significant but reasonable extent and largely without challenge to their jurisdiction. The goal of the majority of tribes is to continue to secure the safety of their people and reservations through cooperative, harmonious relationships with neighboring communities and law enforcement agencies, exercising jurisdiction over non-Indians as necessary to accomplish that purpose.

Tribal courts vary widely in their capacity, range of experience and sophistication. Kitsap County would dismiss the Suquamish court out of hand for its lack of experience and low volume of business. Brief at 18-20. The record in *Belgarde* contains a number of speculative allusions to denial of due process based on criteria such as courtroom size, judicial experience, jury composition, lack of a published code and the like. *See* Brief for Petitioners at 17-18.[32] Again, some perspective appropriate to the issue is sorely needed.

The Navajo Tribal Court presided over by three judges and with courts at three locations is a full-time court which handled some 30,000 cases, 80-100 appeals, and 20-30 jury trials in 1974.[33] SURVEY OF TRIBAL COURTS, *supra* p. 27, at D-58-59. *See also* Fahey, *Native American Justice: The Court of the Navajo Nation,* 59 JUDICATURE 10 (1975). The court maintains separate juvenile and appellate processes. SURVEY OF

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[32] The District Court found Oliphant so far had been afforded his rights to due process and equal protection of the laws. Mem. Op. (W.D. Wash. Apr. 5, 1974); J. App. 51-52.

[33] The Navajo Tribe just recently has begun exercising jurisdiction over non-Indian tribal employees for traffic violations. Arizona Republic (Aug. 19, 1977).

TRIBAL COURTS, D-58. Navajo judges possess life tenure. *Id.* Their requisite qualifications are specified in the tribal code and include knowledge and familiarity with the law in addition to awareness of Navajo custom and culture. *Id.* at D-59. Court facilities include courtrooms, judges' chambers, jury rooms, law libraries, and detention space. *Id.* Professional attorneys practice before the court, and the court has access to legal counsel. *Id.* at D-60. The tribe has entered into agreements with the state, surrounding counties, and other tribes concerning the mutual recognition of court judgments. *Id.* at D-59.

Other tribes to not have the population or resources to support the scale of operations at Navajo but nevertheless maintain sound judicial institutions. A profile of the Gila River court reads much like that of Navajo. *See id.* at D-18. In addition, the tribe has a licensing committee for regulation of practice before the tribal court and cross-deputization and extradition agreements with the county. *Id.* at D-20-21. Appeals are heard by 3-judge panels with visiting judges sitting by designation. *Id.* at D-21.

Overall, the AILTP study shows that of the 100 tribes surveyed, the majority have written codes, full-time judges, and some form of appellate procedure. *See generally id.*, App. C. Forty-one percent of the chief judges have at least some college education, and 16 percent have law degrees. *Id.* at C-15. Sixty-eight percent of these tribes have caseloads in excess of 100 per year and, while jury trials are not frequent, 37 percent of the tribes reported having conducted such proceedings during the year. *Id.* at C-10. Sixty-five percent of the tribes operate on annual budgets of over

$15,000 and 69 percent receive financial support from the BIA, the LEAA, or both. *Id.* at C-10-11.

C. Tribal Assertion of Jurisdiction Over Non-Indians Furthers the Federal Policy of Self-Determination and the Development of Strong Tribal Government.

The American Indian Policy Review Commission concluded that tribal courts are "evolving institutions responding to tribal and community needs and operating at various levels of sophistication." AIPRC, FINAL REPORT 164. Their evolution and the considered extension of jurisdiction by the tribes to all persons within their reservations manifestly are consistent with and vital to the federal policy of recognizing inherent tribal sovereignty and of developing the tribal capacity for self-government.

Since enactment of the Indian Reorganization Act in 1934 it has been the prevailing, albeit uneven, policy of the federal government to strengthen Indian tribal government both politically and economically. *Morton* v. *Mancari,* 417 U.S. 535, 542-43 (1974). The IRA, in reversing decades of destructive policy, provided, *inter alia,* for tribal constitutional organization, including incorporation of all powers vested under existing law (plus others expressly conferred), 25 U.S.C. § 476, and a halt to erosion of the Indian land base; 25 U.S.C. §§ 461, 462, 467. Congress relapsed into assimilationist tendencies in the early 1950's with the passage of House Concurrent Resolution 108, 67 Stat. B132 (1953), and the outright termination of several tribes.[34] Beginning in about 1968, and continuing into the present, Congress and the administration have

[34] *E.g.* Act of June 17, 1954, 68 Stat. 250 (Menominee); 25 U.S.C. § 564 *et seq.* (1970) (Klamath).

generally repudiated such policies. *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L.Rev. 535 (1975).

Congress acted in 1968 to require tribal consent to any further grant of criminal or civil jurisdiction to the states under the provisions of Pub. L. 83-280. 25 U.S.C. § 1326 (1970).[35] In 1970, President Nixon proclaimed a new policy, calling for self-determination and self-realization for Indian people, 116 Cong. Rec. 23,131 (1970), and subsequent legislation has been directed to the same end.[36] The Menominees, terminated in earlier years, were restored in 1973 to federal recognition with full reinstatement of their pre-termination treaty and statutory rights. 25 U.S.C. § 903 *et seq.* (Supp. V, 1975). The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* (Supp. V, 1975), broadly authorized federal contracting with tribes pursuant to a declared policy of establishing meaningful self-determination. This Act specifically provides for contracts or grants for the strengthening or improvement of tribal government. *Id.* § 450h(a)(1).[37] Earlier this year, the congressional American Indian Policy Review Commission [38] recommended that "[t]he long-term objective of Federal-Indian policy be the development of tribal governments into fully operational governments exercising

[35] *See also* President Johnson's Message to Congress, Mar. 6, 1968, 114 Cong. Rec. 5394 (1968).

[36] *See also* S. Con. Res. 26, 92d Cong., 1st Sess. (1971).

[37] *See also* Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (Supp. V, 1975).

[38] *See* Pub. L. 93-580, 88 Stat. 1910 (1975).

the same powers and shouldering the same responsibilities as other local governments." AIPRC, Final Report 154.

The direction of federal policy toward creation of strong, capable tribal self-government is undeniable and has been acknowledged by this Court. *Bryan* v. *Itasca County,* 426 U.S. 373, 388-89, n. 14 (1976). *See also Santa Rosa Band of Indians* v. *Kings County,* 532 F.2d 655, 663 (9th Cir. 1975). The federal self-determination effort necessarily and in fact has included support for the development of tribal courts and assertion of tribal jurisdiction.

As noted above, Congress has authorized and appropriated funds for Indian courts continuously since 1888.[39] Recently, federal funding for tribal justice systems has increased dramatically. The 1974 BIA budget for law enforcement was $8.3 million. Bureau of Indian Affairs, Indian Law Enforcement History 76 (1975). In the 12-month period ending June 30, 1976, however, the BIA, through contract and direct services, spent $24 million for tribal justice systems and the Law Enforcement Assistance Administration of the Department of Justice (LEAA), awarded another $4.69 million in grants to tribes, with an added $900,000 to law enforcement agencies in areas with substantial Indian populations. AIPRC, Final Report 166. The 1977 BIA budget included $3.0 million specifically for tribal judicial services.

More basically, the Department of the Interior has encouraged and formally approved tribal initiatives to extend their jurisdiction territorially to all persons.

[39] See p. 25, *supra*; 25 U.S.C. § 13 (1970).

The trend of the IRA tribes to amend their constitutions to permit jurisdiction over non-Indians has been possible only with formal secretarial approval of such amendments.[40] 25 U.S.C. § 476 (1970). In addition, where the tribal constitution so requires, the Secretary has approved the tribal law and order codes by which this jurisdiction has been effectuated.

Clearly the concept of strong self-government includes the capacity of the tribes to ordain their own justice systems and to adjudicate their grievances through self-established tribal courts. *Tom* v. *Sutton,* 533 F.2d 1101, 1103 (9th Cir. 1976); *Settler* v. *Lameer,* 507 F.2d 231, 238 (9th Cir. 1974); *O'Neal* v. *Cheyenne River Sioux Tribe,* 482 F.2d 1140, 1144-45 (8th Cir. 1973). Thus the Suquamish Tribe in 1973, exercising its inherent powers, enacted a jurisdictional ordinance pursuant to a federally-approved constitution and, consequently, implemented an overriding federal policy of engendering strong tribal government. *See Fisher* v. *District Court,* 424 U.S. 382 (1976).

We submit that prevailing federal policy supports the jurisdiction challenged in this case. To permit the state of Washington to extend its jurisdiction to the reservation as various of Petitioners' theories contemplate plainly would undermine the authority of tribal courts over reservation affairs and thus "interfere with the powers of self-government conferred upon the [tribe] and exercised through the tribal court." *Fisher* v. *District Court,* 424 U.S. 382 (1976); *Williams* v. *Lee,* 358 U.S. 217, 223 (1959). This Court has disavowed such usurpation of power consistently. Nevertheless, under the circumstances of this case and those extant throughout much of Indian country, the same interference with self-government and self-determination and the same corresponding incongruence with federal policy must be found if federal jurisdiction *over non-Indians* is to be held to be exclusive and tribal jurisdiction is, therefore, found lacking. A determination that the tribes generally do not possess concurrent jurisdiction with the federal government over non-Indians for minor criminal offenses would mean, as a practical matter, that tribal law is to a significant degree unenforceable and, therefore, of no consequence. The ability of tribes across the country to protect their citizens through their own legal process would be stunted, if not denied. The tribal legislative power, the dignity and the well-being of the tribe would thus be divested in incalculable measure. The history of Federal-Indian relations contradicts such a result, as would the attendant frustration of clear, established policy.

[40] Since 1970 at least 18 tribes have received formal approval of constitutional amendments permitting them to exercise jurisdiction over non-Indians. Telephone Interview with Pat Simmons, B1A, Tribal Government Services, Sept. 26, 1977.

D. Assertion of Jurisdiction Over Non-Indians Serves Legitimate Tribal Goals of Preserving Reservation Order and Protecting Indian People Through Governmental Administration of Due Process of Law.

If the federal promise of self-government is to be meaningful, Indian tribes must be able to make their own laws and thereby protect themselves and their citizens against all who would infringe the peace of the reservation. This right inheres in any legitimate government. It is indulging unreality to believe this will be accomplished by restricting tribal jurisdiction

to Indians. Indian people long have suffered the depredations of "unprincipled white men" on their reservations without effective recourse, owing to the failures and uncertainties of state and federal law enforcement. It has been but recently that the age-old doctrine of inherent tribal authority has coalesced with federal law and policy to create the potential for real self-government and restoration of the dignity of Indian people within the federal system. *See* Note, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH.L.REV. 955, 956 (1972). This case thus bears heavily upon the course of the tribal future.

We submit that the *Oliphant* case presents no real departure with the past nor infringement of notions of fundamental fairness or due process of law unless it is presumed the tribes are inherently unjust. There is no support for such a conclusion. If it is found in this or future cases that an individual tribe's assertion of jurisdiction over any person under specific circumstances constitutes a denial of due process, remedies exist under the provisions of the Indian Civil Rights Act. 25 U.S.C. § 1301 *et seq.* (1970). Generally speaking, resolution of the issue at hand lies in determining the essential fairness of particular situations rather than in sweeping aside tribal jurisdiction over non-Indians on principle.

Indian tribes long have been recognized to possess the power to exclude undesirable persons from their reservations, *Morris* v. *Hitchcock,* 194 U.S. 384 (1904); *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976), yet this is a deprivation of liberty arguably more serious under many circumstances than the small fines or jail terms commonly imposed in tribal misdemeanor cases. From the exclusionary

power and the related notion of privilege derive the concept of implied consent by which the Suquamish and numerous other tribes have asserted jurisdiction over non-Indians. This Court held in *Hess* v. *Pawloski,* 274 U.S. 352 (1927), that the states afford due process when they subject nonresidents to the state's law on the basis of an individual's consent implied in his enjoyment of a state privilege such as driving on the state's highway.

South Dakota argues at pages 3-4 of its brief that analogies to transients passing through states or counties where they do not reside are unfair under circumstances where petitioners are permanent residents of the reservation and have not left their original sovereigns. The State does not, however, argue for preservation of jurisdiction where the analogy clearly *is* fair, and this Court should not sweep aside the tribe's power to deal with such situations. Where the non-Indian is a reservation resident the situation presents differences. But it is not credible to argue that historically non-Indian interests were established on the reservation without some grant of privilege of settlement to the non-Indian or without notice of the special legal status of the reservation. Historically, the concept of non-Indian consent to jurisdiction is valid.

Moreover, we believe it is profoundly more sound to determine reservation jurisdiction over criminal offenders territorially rather than racially. To do otherwise is to diminish the political character of the tribes and to define them instead as racial aggregations, a view this Court definitively rejected only last term. *United States* v. *Antelope,* —— U.S. ——, 97 S. Ct. 1395 (1977).

We emphasize that this case deals with the *concurrent* jurisdiction of the tribe with either the federal or state government. The lower courts found that the Suquamish subjected petitioners to its jurisdiction in the actual absence of other authority. We do not understand the parties to deny that the United States (or perhaps the State by virtue of Public Law 280) possessed jurisdiction over the subject matter of the alleged offense and that it could have prosecuted petitioners. But it did not. Thus, the question is one of the tribe possessing the power to enforce its law to secure reservation order, to protect a tribal officer and citizens in situations of practical necessity. This is a manifestly reasonable act of any legitimate government.

The available information concerning actual tribal assertion of jurisdiction over non-Indians shows that the power has been invoked moderately and reasonably, though frequently enough to require its preservation. It is a practical response to the necessity of preserving a safe, peaceful home for tribal members.

Those who contend, as does South Dakota, Brief at 4-5, 27-29, that exercise of criminal jurisdiction over non-Indians is not essential to tribal self-government ignore the nature of government and the purpose of law as we know it. Indian tribes seek to prevent the violation of their law, thereby protecting their citizenry as well as their governmental legitimacy so that the reservation will be habitable and their governments stable and progressive. If assertion of jurisdiction over non-Indians fulfills those purposes, then it is crucial to self-government and properly aligned with federal policy.

CONCLUSION

We respectfully pray that the decisions below be affirmed because residual Indian sovereignty never has been terminated.

Nevertheless, we recognize that in our analysis of the broadly-framed issue of whether Indian tribes, under any circumstances, can exercise jurisdiction over non-Indians we necessarily have had to travel outside the record. *Amici* supporting petitioners have ranged further afield in creating their broad issue and in describing the jurisdictional situation in the various states, the social and demographic characteristics of Kitsap County, and the attributes of the Suquamish tribe and its court. Should this record supplementation lead the Court to question the adequacy of the existing record, we respectfully suggest that the writ of certiorari could properly be dismissed as improvidently granted. *Gilbert* v. *California,* 388 U.S. 263, 269 (1967); *Mitchell* v. *Oregon Frozen Foods Co.,* 361 U.S. 231 (1960).

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APPENDIX

APPENDIX A [1a]

Reservation	LAND BASE (acres) [2a] Tribally Owned	Land [4a] Alloted/or Non-Indian	Total [5a]	% Allotted/or Non-Indian	POPULATION [3a] Indian	Non-Indian	Total	% Non-Indian
Alaska								
Annette Island	86,741	0	86,741	0	1,042	500	1,542	32.4
Arizona								
Ak Chin	21,840	0	21,840	0	312	20	332	6.0
Camp Verde	560	80	640	12.5	280	30	310	9.7
Cocopah	528	0	528	0	360	10	370	2.7
Colorado River	258,134	5,958	264,092	2.3	1,673	3,672	5,345	68.7
Fort Apache	1,664,872	0	1,664,872	0	8,077	1,355	9,432	14.4
Fort McDowell	24,680	0	24,680	0	330	2	332	.6
Gila River	274,462	97,467	371,929	26.2	6,405	264	6,669	4.0
Havasupai	3,058	0	3,058	0	308	17	325	5.2
Hopi	2,472,254	0	2,472,254	0	5,673	214	5,887	3.6
Hualapai	991,680	0	992,463	0	703	80	783	10.2
Kaibab	120,413	0	120,413	0	122	37	159	23.3
Navajo	12,940,191	722,854	13,989,222	7.5	125,520	7,355	132,875	5.5
Papago	2,814,871	41,003	2,855,874	1.4	8,707	303	9,010	3.4
Salt River	24,859	24,435	49,294	49.6	2,809	84	2,893	2.9
San Carlos	1,853,841	960	1,877,216	.1	5,619	382	6,001	6.4
Yavapai	1,399	160	1,559	10.3	50	N.A.	50	0
Fort Mojave	*41,884	0	41,884	0	374	850	1,224	69.4

Reservation	Tribal	Land Alloted/or Non-Indian	Total	% Allotted/or Non-Indian	Indian	Non-Indian	Total	% Non-Indian
Colorado								
Southern Ute	301,867	4,966	307,110	1.6	792	3,334	4,126	80.8
Ute Mountain	586,288	9,459	595,787	1.6	1,299	77	1,376	5.6
Idaho								
Coeur D'Alene	16,236	53,063	69,299	76.6	450	2,742	3,192	85.9
Fort Hall	224,006	257,666	524,014	49.2	2,258	1,342	3,600	37.3
Michigan								
Bay Mills	•2,189	0	2,189	0	304	60	364	16.5
Hannahville	•3,411	0	3,408	100.0	NA	NA	NA	—
Isabella	506	678	1,184	57.3	NA	NA	NA	—
Keweenaw Bay	1,610	8,124	13,750	59.1	758	6,000	6,758	88.8
Minnesota								
Leech Lake	14,069	12,693	26,766	47.4	2,014	4,885	•6,899	70.8
Nett Lake	30,035	75,244	105,284	71.5	650	22	672	3.3
Mississippi								
Choctaw	17,381	209	17,819	1.2	1,612	125	1,737	7.2
Montana								
Blackfeet	119,806	819,604	950,643	86.3	5,676	1.676	7,352	22.8
Crow	344,305	1,209,949	1,554,254	77.8	4,269	2,469	6,738	36.6
Flathead	562,277	680,674	1,243,968	54.7	2,910	12,831	15,741	81.5
Fort Belknap	162,933	453,115	616,048	73.6	1,603	246	1,849	13.3
Fort Peck	233,153	645,114	964,865	66.9	3,812	6,461	10,273	62.9
Northern Cheyenne	262,296	171,298	433,594	39.5	2,959	443	3,402	13.0
Rocky Boy's	107,613	0	107,613	0	1,528	51	1,579	3.2
Nebraska								
Omaha	11,553	18,860	39,413	47.9	1,362	2,293	3,655	62.7
Nevada								
Battle Mountain	688	0	688	0	NA	NA	NA	—
Carson	160	0	160	0	NA	NA	NA	—
Dresslerville	40	0	40	0	NA	NA	NA	—
Duck Valley	289,819	0	293,674	0	1,007	119	1,126	10.6
Duckwater	3,785	0	3,785	0	NA	NA	NA	—
Elko	193	0	193	0	NA	NA	NA	—
Fallon	900	4,640	5,540	83.8	NA	NA	NA	—
Fort McDermitt	16,396	18,414	34,810	52.9	407	NA	NA	—
Lovelock	20	0	20	0	117	NA	NA	—
Moapa	1,174	0	1,174	0	NA	NA	NA	—
Pyramid Lake	475,085	0	475,085	0	•400	•201	•601	33.4
Reno-Sparks	28	0	28	0	NA	NA	NA	—
South Fork/Odgers	15,037	0	15,037	0	NA	NA	NA	—
Summit Lake	10,289	765	11,054	6.9	NA	NA	NA	—
Walker River	316,670	8,752	323,386	2.7	452	140	592	23.6
Winnemucca	340	0	340	0	NA	NA	NA	—
Yerington	1,166	0	1,166	0	NA	NA	NA	—
Yomba	4,718	0	4,718	0	NA	NA	NA	—
New Mexico								
Acoma Pueblo	245,346	326	245,672	0.1	2,129	26	2,155	1.2
Cochiti Pueblo	28,776	0	28,779	0	544	245	789	31.1
Isleta Pueblo	210,937	11	210,948	0.0	2,255	68	2,373	2.9
Jemez Pueblo	88,860	0	88,867	0	1,756	195	1,951	10.1
Jicarilla	742,315	0	742,315	0	1,976	494	2,470	20.0

Reservation	Tribal	Land Allotted/or Non-Indian	Total	% Allotted/or Non-Indian	Indian	Non-Indian	Total	% Non-Indian
Laguna Pueblo	412,211	41,226	454,454	9.1	3,258	199	3,457	5.8
Mescalero	460,384	0	460,384	0	2,253	257	2,510	10.2
Nambe Pueblo	19,073	0	19,075	0	383	666	1,049	63.5
Picuris Pueblo	14,947	0	14,947	0	•90	•1,407	•1,497	94.0
Pojoaque Pueblo	11,599	0	11,599	0	104	•1,230	1,334	92.2
Ramah	85,961	47,633	146,996	32.4	•1,021	•258	•1,279	20.2
Sandia Pueblo	22,884	0	22,884	0	•190	•336	•526	63.9
San Felipe Pueblo	48,853	77	48,930	0.2	1,858	377	2,235	16.9
San Ildefonso	26,192	0	26,192	0	304	686	990	69.3
San Juan Pueblo	12,232	2	12,234	0.0	1,666	3,275	4,941	66.3
Santa Ana Pueblo	42,527	0	42,527	0	421	1	422	0.2
Santa Clara Pueblo	45,744	4	45,748	0.0	1,035	10	1,045	1.0
Santo Domingo Pueblo	69,260	0	69,260	0	•1,719	•106	•1,825	5.8
Taos Pueblo	95,333	0	95,333	0	•1,086	•3,609	•4,695	76.9
Tesuque Pueblo	16,810	3	16,813	0.0	•195	•165	•360	45.8
Zia Pueblo	112,510	0	112,511	0	546	3	549	0.5
Zuni Peublo	405,034	2,213	407,247	0.5	5,975	399	6,374	6.3
North Dakota								
Fort Berthold	45,044	935,262	980,500	95.4	3,051	209	3,260	6.4
Fort Totten	473	240,434	244,507	98.3	•1,511	•1,209	•2,720	44.4
Standing Rock	294,840	542,701	847,799	64.0	•1,850	•1,782	•3,632	49.1
Turtle Mountain	35,579	34,144	70,240	48.6	4,581	347	4,928	7.0

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Oregon								
Burns Paiute	0	11,014	11,786	93.4	123	NA	NA	—
Umatilla	15,646	230,153	245,799	93.6	•407	•2,876	•3,283	87.6
Warm Springs	480,196	84,118	564,330	14.9	1,922	185	2,107	8.8
South Dakota								
Cheyenne River	911,467	503,483	1,419,504	35.5	4,487	3,795	8,282	45.8
Crow Creek	31,112	72,339	122,531	59.0	1,432	442	1,874	23.6
Flandreau	2,180	0	2,356	0	•666	•6,956	•7,622	91.3
Lower Brule	74,863	31,872	119,944	26.6	743	145	888	16.3
Pine Ridge	372,243	2,358,236	2,778,710	84.9	9,237	3,941	13,178	29.9
Rosebud	409,321	540,112	978,230	55.2	8,410	16,470	24,880	66.2
Sisseton	877	105,172	106,211	99.0	3,241	11,309	14,550	77.7
Yankton	5,560	429,372	434,932	98.7	1,227	5,705	6,932	82.3
Utah								
Uintah and Ouray	97 ,273	37,855	1,008,152	3.8	1,645	8,329	9,974	83.5
Washington								
Colville	937,240	74,255	1,011,495	7.3	2,560	1,495	4,055	36.9
Hoh	443	0	443	0	73	NA	NA	—
Kalispel	409	4,220	4,629	91.2	123	20	143	14.0
Lower Elwha	372	0	372	0	114	NA	NA	—
Lummi	247	7,073	7,320	96.6	1,305	905	2,210	41.0
Makah	24,526	2,487	27,013	9.2	920	209	1,129	18.5
Muckleshoot	0	1,188	1,189	99.9	NA	NA	NA	—
Nisqually	3	813	816	99.6	111	150	261	57.5
Port Gamble	1,301	0	1,301	0	263	0	263	0
Port Madison	41	2,638	2,680	98.4	176	3,000	3,176	94.5

5a

Reservation	Tribal	Land Allotted/or Non-Indian	Total	% Allotted/or Non-Indian	Indian	Non-Indian	Total	% Non-Indian
Quileute	584	10	594	1.7	331	NA	NA	—
Quinault	4,414	184,629	189,061	97.7	1,153	303	1,456	20.8
Shoalwater	335	0	335	0	11	NA	NA	—
Skokomish	16	4,971	4,987	99.7	255	69	324	21.3
Spokane	102,441	34,523	137,002	25.2	743	209	952	22.0
Squaxin Island	0	1,494	1,496	99.9	312	NA	NA	—
Swinomish	273	6,790	7,063	96.1	386	403	789	51.1
Tulalip	5,171	3,707	8,878	41.8	502	1,034	1,536	67.3
Yakima	842,978	524,404	1,367,405	38.4	5,210	17,714	22,924	77.3
Wisconsin								
Bad River	8,325	33,477	54,912	61.0	•480	•266	•746	35.7
Lac Courte Oreilles	3,945	26,584	43,719	60.8	•571	•422	•993	42.5
Menominee	—	—	•••233,902	—	2,707	301	3,008	10.0
Wyoming								
Wind River	1,776,136	109,344	1,886,556		4,677	11,938	16,615	71.9

6a

• Signifies unpublished data provided to amicus by BIA based on 1970 census.

•• Signifies data taken from BIA, ANNUAL REPORT OF INDIAN LANDS, *infra* note 2a.

••• Figure obtained from PLANNING SUPPORT GROUP, BIA, MENOMINEE INDIAN TRIBE OF WISCONSIN, 4 (1975).

[1a] Appendix "A" represents land base and population data for those tribes maintaining some form of court system. The tribes of California and Oklahoma are generally excluded on the basis of the jurisdictional status of those states.

[2a] Acreage figures, unless otherwise indicated, are taken from U.S. DEP'T OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS (1974); *Compare* BIA, OFFICE OF TRUST RESPONSIBILITIES, ANNUAL REPORT OF INDIAN LANDS (June 30, 1974).

[3a] Population figures, unless otherwise indicated, are taken from SURVEY OF TRIBAL COURTS, *supra*, App. D which in turn were based on a 1973 BIA update of the 1970 census and, in some cases, a 1976 BIA estimate. *Id.* at D-1. Non-Indian population is based on the 1970 census. *Id.*

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[4a] The category Allotted/or Non-Indian reflects a total of two categories. Allotted land may, of course, be owned either by Indians or non-Indians.

[5a] The sum of the acreage of tribal lands and allotted/non-Indian lands may be less than the total where the reservation includes government-owned land.

APPENDIX B

Name of Tribe: _____

Time Period of Information: _____

Total Number of cases handled by tribal Court: _____

Number of Criminal cases: _____
(include traffic, hunting and fishing violations)
Non-Indian defendant in criminal cases: _____
Indian non-member in criminal cases: _____

Number of Civil cases: _____
Non-Indian plaintiff in civil cases: _____
Non-member plaintiff in civil cases: _____
Non-Indian defendant in civil cases: _____
Non-member defendant in civil cases: _____

Does your tribe have an implied consent ordinance?
Yes _____ No _____

Please state the reasons the tribe has found it necessary or advisable to exercise jurisdiction over:

(a) Non-Indians: _____
_____
_____
_____

(b) Non-member Indians: _____
_____
_____
_____

_____
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IN THE

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OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,

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Respondents.

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Pursuant to Rule 42(2), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, the Seneca Nation of Indians of New York, the Oglala Sioux Tribe of the Pine Ridge

Reservation, South Dakota, the Hualapai Tribe of Arizona, the Pueblo of Laguna, New Mexico, and the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, file the attached brief *amici curiae* in support of respondents in the above-captioned case. The petitioners, Mark David Oliphant and Daniel B. Belgarde, and the respondents, the Suquamish Indian Tribe, et al. have consented to the filing of this brief *amici curiae*.

INTEREST OF *AMICI CURIAE*

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Rosebud Sioux Tribe v. Kneip*, ___ U.S. ___, 51 L.Ed.2d 660 (1977), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), *Puyallup Tribe v. Dept of Game*, 391 U.S. 392 (1968), and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

The Seneca Nation, the Oglala Sioux Tribe, the Hualapai Tribe, the Pueblo of Laguna, and the Cheyenne River Sioux Tribe are federally recognized

Indian tribes which, respectively, exercise extensive powers of self-government on the Allegany and Cattaraugus Reservations, the Pine Ridge Reservation, the Hualapai Reservation, the Laguna Reservation, and the Cheyenne River Reservation. Specifically, the aforementioned Indian tribes have established law enforcement systems, and have adopted tribal laws and regulations governing conduct occurring within their reservation boundaries.[1]

This case presents a question of great and continuing concern to the Association, the Seneca Nation, the Oglala Sioux Tribe, the Hualapai Tribe, the Pueblo of Laguna, and the Cheyenne River Sioux Tribe—whether Indian tribes possess inherent jurisdiction, absent express federal treaty or statutory provisions to the contrary, over crimes committed by non-Indians on Indian reservations. In the present case *amici curiae* are concerned with this broad issue in a specific context—namely, whether, in light of the fact its authority to do so has not been limited by a federal treaty or statute, the Suquamish Indian Tribe has the power to exercise jurisdiction with respect to offenses committed by non-Indians within the boundaries of the Port Madison Indian Reservation in the State of Washington.

If the Court of Appeals' decision in this case is not upheld, the Seneca Nation, the Oglala Sioux Tribe, the Hualapai Tribe, the Pueblo of Laguna, and the Cheyenne River Sioux Tribe, as well as numerous other Indian tribes

---

[1] Although at the present time the Seneca Nation's tribal courts do not exercise criminal jurisdiction, the Nation frequently is faced with law enforcement problems relating to non-Indians – e.g., attempts to hunt and fish illegally on reservation lands, or to dump trash and refuse on the Seneca property. The Nation's ability to control such conduct obviously would be greatly enhanced if its authority over the criminal activities of non-Indians on the Seneca reservations were clarified and confirmed.

in a similar situation,[2] will not be able to administer effectively systems of criminal justice on their reservations. Even when they possess the authority to do so, state and federal governments historically have demonstrated disturbingly little inclination or capacity for maintaining law and order on Indian reservations with respect to non-Indian offenders. Increasing numbers of tribal courts, therefore, have attempted to fill the law enforcement vacuum created by state and federal disinterest through a strengthening of tribal judicial institutions and the extension of tribal criminal jurisdiction to encompass offenses committed by non-Indians on reservation lands. If Indian tribes are denied the authority to exercise such jurisdiction, their ability to administer effective systems of criminal justice will be diminished substantially. At worst—and it is by no means a fanciful proposition—Indian reservations may become a virtual haven for non-Indian elements who are only too willing to capitalize on the historical unwillingness of state and federal authorities diligently to enforce criminal laws on Indian lands.

In order to facilitate the Court's consideration of the extremely broad legal and policy implications of this case, the Association, the Seneca Nation, the Oglala Sioux Tribe, the Hualapai Tribe, the Pueblo of Laguna, and the Cheyenne River Sioux Tribe have chosen to address issues which are not likely to be covered—or to be approached in identical fashion—in briefs submitted by respondents. Specifically, the attached brief is offered to assist the Court in recognizing that: (1) the

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[2] At the present time well over 100 Indian tribes administer criminal justice systems through tribal courts. *See generally Indian Self-Determination and the Role of Tribal Courts* (American Indian Lawyer Training Program, Inc., 1977).

Suquamish Indian Tribe possesses the power to exercise criminal jurisdiction over offenses committed by non-Indians on the Port Madison Reservation because its authority to do so has not been limited expressly by a federal treaty or statute; (2) as a matter of sound policy, the jurisdiction of Indian tribes over crimes committed by non-Indians is essential to the administration of criminal justice on Indian reservations.

STATEMENT OF THE CASE

Pursuant to the Treaty of Point Elliott, which was entered into on January 22, 1855, certain lands in what is now the State of Washington were set aside for the benefit of the Suquamish Indian Tribe and other enumerated bands of Indians. Specifically, Article II of the Treaty provided the following:

> [The described] tracts [of land] shall be set apart, and so far as necessary surveyed and marked out for [the tribes'] exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent. . . .

Treaty of January 22, 1855, 12 Stat. 927, 928.

At the present time the Suquamish Indian Tribe is a federally recognized Indian tribe which has organized under the Indian Reorganization Act of 1934, 25 U.S.C. §476. In 1965 the Tribe adopted a Constitution and By-laws which were approved by the Secretary of the Interior. Furthermore, in 1973 the Tribe enacted a Judicial Code which created a trial court and court of appeals, and provided that the tribal courts shall have original jurisdiction over all but "major crimes" committed by Indians or non-Indians occurring anywhere within the boundaries of the Port Madison Reservation.

The Suquamish Indian Tribe, which acts as the local government on the Port Madison Reservation and qualifies as a unit of local government under both the Revenue Sharing Act of 1973[3] and the Omnibus Crime Control and Safe Streets Act of 1968[4], has received substantial federal funds for the improvement of law enforcement on the Reservation. The tribal judges frequently participate in the numerous seminars and training sessions which have been established on a broad scale by the Bureau of Indian Affairs and the National American Indian Court Judges Association for the express purpose of upgrading tribal judiciaries. Furthermore, the Suquamish Tribe's law enforcement officers have attended Indian police academies and have received additional in-service training.

The relevant facts relating to petitioners Mark Oliphant and Daniel Belgarde can be summarized in the following manner. On August 19, 1973, petitioner Oliphant, a non-Indian residing on the Port Madison Indian Reservation, became involved in an altercation on the Suquamish Tribal Encampment Grounds, which are held in trust by the United States for the benefit of the Suquamish Indian Tribe. A Suquamish tribal policeman called to the scene was assaulted by petitioner, who, as the result of his conduct, was placed under arrest for assaulting a police officer and resisting arrest. The foregoing events occurred during the annual Suquamish Tribal Celebration known as Chief Seattle Days.

The petitioner was arraigned before the tribal court, and bail was set at $200. He did not post bail, and was incarcerated briefly in a local city jail until he

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[3] See 31 U.S.C. §§ 1221 *et seq.* (1973 Supp.).

[4] See 18 U.S.C. §§ 921 *et seq.* (1970).

subsequently was released on his own recognizance pursuant to an order of the tribal court. In August and September of 1973, a petition and supplement to petition for a writ of habeas corpus were filed in the United States District Court for the Western District of Washington. The petitions challenged the authority of the Suquamish Indian Tribe to exercise jurisdiction over Oliphant.

On October 12, 1974, petitioner Belgarde, a non-Indian, was arrested by Suquamish tribal policemen on a state highway located within the boundaries of the Port Madison Reservation for committing the offenses of injury to public property and reckless endangerment. In December 1974, Belgarde filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington which also challenged the authority of the Suquamish Indian Tribe to exercise criminal jurisdiction over non-Indians.

The District Court upheld the exercise of criminal jurisdiction by the Suquamish Tribe in both cases and denied the petitions for a writ of habeas corpus. The United States Court of Appeals for the Ninth Circuit upheld the decision of the District Court in *Oliphant v. Suquamish Indian Tribe* based upon a finding that no federal treaty or law prohibited the Suquamish Indians from exercising jurisdiction over non-Indians committing crimes within the boundaries of the Port Madison Reservation.

SUMMARY OF ARGUMENT

Except as expressly limited by a federal treaty or statute, an Indian tribe possesses jurisdiction over all crimes committed within the boundaries of its reservation. In light of the fact that no federal treaty or

statute restricts the Suquamish Indian Tribe's criminal authority, the Tribe has the power to exercise criminal jurisdiction over offenses committed by non-Indians on the Port Madison Reservation. Moreover, as a matter of sound policy, the jurisdiction of Indian tribes over crimes committed by non-Indians is essential to the administration of criminal justice on Indian reservations.

ARGUMENT

I.

EXCEPT AS EXPRESSLY LIMITED BY A FEDERAL TREATY OR STATUTE, AN INDIAN TRIBE POSSESSES JURISDICTION OVER ALL CRIMES COMMITTED WITHIN THE BOUNDARIES OF ITS RESERVATION.

Absent federal treaty or statutory provisions to the contrary, an Indian tribe has the inherent power to exercise criminal jurisdiction over any crimes committed on reservation lands. Moreover, tribal jurisdiction is territorial rather than personal in nature and extends to non-Indians.

A. In the absence of a federal treaty or statute to the contrary, an Indian tribe has the inherent authority to establish a criminal justice system for the maintenance of law and order on its reservation.

The fundamental principles of tribal self-government were stated in their most classic form by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). There the State of Georgia had attempted to assert jurisdiction over lands belonging to the Cherokee Nation by imprisoning a non-Indian who was living among the Cherokees with their consent. In declaring the state's action to be unconstitutional Chief Justice

Marshall offered the following analysis of the derivation of an Indian tribe's powers of self-government:

> The Indian nations had always been considered as distinct, independent political communities. . . .
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> * * * * *
>
> [A]nd the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states', says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self-government under the guaranty and protection of one or more allies.
>
> The Cherokee Nation, then, is a distinct political community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with acts of Congress. The whole intercourse between the United States and this Nation, is, by our constitution and laws, vested in the Government of the United States. The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity . . . .[5]

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[5]The petitioners and *amici curiae* supporting them attempt to utilize the Supreme Court's decision in Kake v. Egan, 369 U.S.

[footnote continued]

Id. at 559, 560-61. *Accord, Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831).[6]

The principle of exclusive tribal powers of internal self-government established by the *Worcester* decision has not remained totally unaltered through the passage of time and changing conditions in Indian affairs. According to the leading commentator on Indian law, however, Chief Justice Marshall's opinion still must serve as the analytical point for commencement for any discussion of tribal sovereignty:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest

60 (1962), to stand the *Worcester* case on its head—namely, by arguing that the *Kake* decision established the principle that states have the authority to impose their laws on Indian reservations absent Congressional legislation to the contrary. In the first instance, the *Kake* case involved the state regulation of off- rather than on-reservation activities, and is, for that reason, not relevant here. Moreover, to the extent Kake v. Egan stands for the principle attributed to it by petitioners, the decision has been limited severely—if not implicitly discredited—by the Supreme Court's subsequent decisions in Warren Trading Post v. Tax Comm'n, 380 U.S. 686 (1965), and McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).

[6] The *amicus curiae* Kitsap County makes extensive use of the separate opinions filed by Justice Baldwin and Justice Johnson in the *Cherokee Nation* case to support the proposition that Indian tribes should not be considered "foreign nations". See Brief for *Amicus Curiae* Kitsap County, at 27. The argument propounded by petitioner is deficient in two respects. First, the Johnson and Baldwin views were not the opinion of the Court, and they have, therefore, little value as legal precedent. Second, as Chief Justice Marshall indicated explicitly in the *Worcester* case, the authority of Indian tribes to exercise powers of self-government was never dependent upon their classification as "foreign nations".

> renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

F. COHEN,[7] HANDBOOK OF FEDERAL INDIAN LAW 123 (1942). *Accord, Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

Courts repeatedly have confirmed the authority of Indian tribes to regulate, as a direct attribute of their powers of self-government, a wide range of activities and conduct occurring on Indian lands. In *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), for example, the Eighth Circuit upheld the Creek Nation's imposition of a tax on non-Indians residing within its borders:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

[7] In deciding Indian cases, Felix S. Cohen frequently has been relied upon by this Court, and, indeed, in Squire v. Capoeman, 351 U.S. 1, 9 (1956), was referred to as "an acknowledged expert in Indian law. . . ."

Id. at 950. *See Morris v. Hitchcock*, 194 U.S. 384 (1904); *Quechan Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976).

Furthermore, the legal principles described above have been applied on numerous occasions in the specific context of tribal criminal jurisdiction. Specifically, the rules have been summarized in the following fashion:

> So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. . . Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (1942). *Accord*, 55 I.D. 14, 57 (1934); *see generally Raymond v. Raymond*, 83 Fed. 721 (8th Cir. 1897); *Standley v. Roberts*, 59 Fed. 836 (8th Cir. 1894).

B. The criminal jurisdiction exercised by Indian tribes is territorial rather than personal in nature and extends to non-Indians.

Legal authorities also have affirmed the proposition that the power over crimes which Indian tribes possess is territorial rather than personal in scope and extends to non-Indians. From an historical perspective, the involvement of a non-Indian in a crime committed on reservation lands by no means has effected a loss of tribal jurisdiction. Indeed, numerous courts have confirmed the jurisdiction of tribes over offenses by tribal members against non-Indians. *See* Vollman, *Criminal Jurisdiction in Indian Country*, 22 U. KAN. L.

REV. 387, 391 (1974); M. WEST, MANUAL OF INDIAN CRIMINAL JURISDICTION § D-2, at 63 (1977).

More important, legal authorities also have held that the criminal jurisdiction of Indian tribes extends to non-Indians committing offenses within the boundaries of Indian reservations. Specifically, the applicable rule has been summarized by the Solicitor of the Department of the Interior as the following: an Indian tribe may "punish aliens within its jurisdiction according to its own laws and customs". 55 I.D. 14, 57 (1934). *Accord*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (1942).[8]

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[8]The Office of the Solicitor subsequently did rely on the 1934 opinion in holding that the inherent authority of Indian tribes was limited to tribal members, and that any powers exercised with respect to non-Indians had to be delegated by the Secretary of the Interior. *See* Memo. Sol., Nov. 17, 1936; Memo. Sol., Feb. 17, 1939. The later opinions, which apparently construed citations in the 1934 document supporting tribal jurisdiction over members as suggesting impliedly a limitation on tribal powers, basically adopted the position that the criminal jurisdiction exercised by Indian tribes was personal rather than territorial.

The basis for the "personal" view of tribal jurisdiction espoused in the later Solicitor's opinions was unclear. The assumption may have been made that jurisdiction extended originally only to tribal members, but most authority clearly is to the contrary. *See* Indian Cong. Doc. No. 124, 20th Cong., 2nd Sess. (1828-29); H.R. Rep. No. 474, 23rd Cong., 1st Session. 13 (1834).

Alternatively, the proposition that tribal jurisdiction was "personal" in nature may have developed from a perception of tribal courts as "mere educational and disciplinary instrumentalities" created by the Secretary of the Interior for the purpose of elevating and improving the conditions of Indian tribes—a description employed to describe Courts of Indian Offenses in United States v. Clapox, 35 Fed. 575 (D. Ore. 1888). Courts of Indian Offenses, however, have been aptly described as

[footnote continued]

Furthermore, in strong *dicta* the Supreme Court recently has lent considerable support to the proposition that Indian tribes exercise civil and criminal jurisdiction which is distinctly territorial in nature and encompasses the activities of non-Indians. In *Williams v. Lee*, 358 U.S. 217 (1958), which involved a suit by a non-Indian against an Indian in state court to recover a debt, the Court, in developing its analysis, made the following statement concerning the extent of tribal criminal jurisdiction: "... if the crime was by or against an Indian, *tribal jurisdiction* or that expressly conferred on other courts by Congress has remained exclusive." (Emphasis added.) *Id.* at 220. Justice Black emphasized explicitly that the presence of a non-Indian as a party to the proceedings in the *Williams* case was of no legal relevance:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.... The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223.

A similar theme emerges from the Supreme Court's recent decision in *United States v. Mazurie*, 419 U.S. 544 (1975). There, in upholding the jurisdiction of an Indian tribe over non-Indians with respect to the regulation of the sale of liquor within reservation

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"arms of the federal government", and were established as administrative federal courts subject to a number of statutory restrictions not applicable to tribal courts in general. Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965). Limitations imposed on Courts of Indian Offenses, therefore, should not be allowed to determine the ultimate scope of tribal criminal jurisdiction. *See generaliy* M. West, *Manual of Indian Criminal Jurisdiction* §E-10, at 80 (1977).

boundaries, the following summary of tribal authority was offered:

> ... [I]t is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory*, Worcester v. Georgia, 6 Pet 515, 557, 8 L Ed 483 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations...,' United States v. Kagama, 118 US 375, 381-382, 30 L Ed 228, 6 S Ct 1109 (1886); McClanahan v. Arizona State Tax Comm'n, 411 US 164, 173, 36 L Ed 2d 129, 93 S Ct 1257 (1973). [Emphasis added.]

Id. at 557. Moreover, the *Mazurie* opinion, citing the *Williams* case, again explicitly affirmed the "... authority of tribal courts ... over non-Indians, insofar as ... their transactions on a reservation [are concerned.]" *Id.* at 558.

In light of the aforementioned discussion, a number of conclusions can be drawn concerning the jurisdiction of Indian tribes over offenses committed on their reservations. First, except as expressly limited by a federal treaty or statute, Indian tribes possess the inherent authority to establish a system for administering criminal justice, and to develop specific laws and regulations governing its operation. Furthermore, the criminal jurisdiction so exercised by Indian tribes is fundamentally territorial in nature and extends to non-Indians who commit offenses within reservation boundaries. Thus, the specific question in this case becomes whether a federal treaty or statute exists which expressly limits the Suquamish Indian Tribe's power to exercise jurisdiction over crimes committed by non-Indians within the external boundaries of the Port Madison Reservation.

II.

NO FEDERAL TREATY OR STATUTE HAS LIMITED THE AUTHORITY OF THE SUQUAMISH INDIAN TRIBE OVER OFFENSES COMMITTED BY NON-INDIANS ON THE PORT MADISON RESERVATION, AND THE TRIBE, THEREFORE, POSSESSES THE POWER TO EXERCISE JURISDICTION WITH RESPECT TO CRIMES COMMITTED BY NON-INDIANS WITHIN RESERVATION BOUNDARIES.[9]

The question whether a federal treaty or statute has limited the criminal jurisdiction of the Suquamish Indian Tribe over non-Indians must be decided on the basis of a number of established rules of treaty and statutory construction. First, based upon settled principles of law, doubtful expressions in treaties and statutes relating to Indian tribes are to be resolved in favor of Indian interests. *See Bryan v. Itasca County*, 426 U.S. 373 (1976); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); *Jones v. Meehan*, 175 U.S. 1 (1899). Second, federal statutes which do appear to limit the powers of self-government exercised by Indian

[9] Although the events leading to petitioner Belgarde's arrest occurred on a state highway traversing the Port Madison Reservation rather than on trust property—as in petitioner Oliphant's case—the distinction does not alter the conclusion that the Suquamish Indian Tribe possessed jurisdiction over Belgarde. Provisions in federal law and decisions of the Supreme Court have made clear the proposition that, for purposes of federal jurisdiction, a state right of way located within the exterior boundaries of an Indian reservation is to be considered Indian country. See 18 U.S.C. §1151 (1970); *see generally* Seymour v. Superintendent, 368 U.S. 351 (1961).

[footnote continued]

tribes are not to be extended by doubtful inference. *See In re Mayfield*, 141 U.S. 107 (1891); *cf. United States v. Quiver*, 241 U.S. 602 (1916). Finally, as a matter of established legal authority, a restriction on ordinary governmental powers must appear by express provision or necessary implication, and, moreover, a presumption of the competency of a local jurisdiction is to be indulged. *See Morris v. Hitchcock*, 21 App. D.C. Cir. 1903), *aff'd*, 194 U.S. 384 (1904); 7 OP. ATT'Y GEN. 174, 180 (1855).

A. The treaties entered into between the Suquamish Indian Tribe and the United States contain no provisions limiting the jurisdiction of the Tribe over crimes committed by non-Indians within the boundaries of the Port Madison Reservation.

The Treaty of Point Elliott, which was the first agreement entered into between the Suquamish Indian Tribe and the United States, does not expressly limit tribal jurisdiction over offenses committeed by non-

In Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975), the court adopted an identical rule with respect to *tribal* jurisdiction over state highways located on Indian reservations. The *Ortiz-Barraza* case involved the question, *inter alia*, whether the Papago tribal police had the authority to stop a non-Indian and search him on a state highway which crossed the Papago Reservation. The court concluded as follows:

> . . . [W]e note that the fact that the events of interest here may have occurred within the right-of-way for a state highway avails the defendant nothing. *Rights of way running through a reservation remain a part of the reservation and within the territorial jurisdiction of the tribal police. See*, Gurneau v. Smith, 207 N.W. 2nd 256 (N. Dak. 1973); 18 U.S.C. §1151 (1970). [Emphasis added.]

Id. at 1180.

Indians on reservation lands. Indeed, the opposite inference can be drawn readily from provisions in the Treaty which state that the Port Madison Reservation is being established for the Tribe's exclusive use, and, moreover, that no non-Indian shall be permitted to reside upon the Tribe's lands without its permission. Treaty of January 22, 1855, 12 Stat. 927, 928. The only provision in the agreement which relates in any way to the Suquamish Indian Tribe's internal sovereignty appears in article IX, pursuant to which the Indian signatories agreed not to "...shelter or conceal offenders against the law of the United States, but to deliver them up to the authorities for trial."[10] 12 Stat. at 929.

[10] For a number of reasons, the "delivery up" provisions contained in the Treaty of Point Elliott should not be construed to divest the Suquamish Indian Tribe of criminal jurisdiction over non-Indians. The explicitly articulated policy of the federal government during the late eighteenth and early nineteenth centuries was to interject its authority as a buffer between Indian tribes and frequently hostile local non-Indian populations in tribally-controlled areas. The "delivery up" provisions such as those contained in the Treaty of Point Elliott were adopted in furtherance of the foregoing policy. *See* generally H.R. Rep. No. 474, 23rd Cong., 1st Sess. (1834). Pursuant to such provisions, the federal government undertook to prosecute and punish non-Indians for offenses committed against Indians, and, in doing so, reassured Indian tribes that non-Indian offenders were being punished – and without offending the local non-Indian community.

Against this historical background no reason exists for assuming that Indian tribes understood themselves to be permanently divested of criminal jurisdiction over non-Indians as the result of agreeing to "delivery up" provisions in treaties. To the contrary, the more reasonable conclusion is that Indian tribes merely wished to enlist the assistance of the federal sovereign to avoid antagonizing their non-Indian neighbors while still effecting the maintenance of law and order on their reservations.

Nor does the second agreement entered into in 1905 between the Suquamish Indian Tribe and the United States contain provisions limiting tribal authority over offenses committed within reservation boundaries by non-Indians. *See generally* Act of March 3, 1905, 33 Stat. 1048, 1078-79. The 1905 agreement not only failed to withdraw any powers from the Tribe, but also indicated explicitly that it did not deprive the signatories of any benefits "...not inconsistent with the provisions of this agreement." 33 Stat. at 1079. Thus, none of the treaties or agreements entered into between the Suquamish Indian Tribe and the United States contains language which expressly or impliedly limits tribal criminal jurisdiction over non-Indians.

B. The General Crimes Act did not effect a preemption of the Suquamish Indian Tribe's jurisdiction over crimes committed by non-Indians on the Port Madison Reservation.[11]

The federal statute primarily relied upon by petitioners Oliphant and Belgarde as preempting tribal jurisdiction over offenses committed by non-Indians is the General Crimes Act. See 18 U.S.C. §1152 (1970). Specifically, the Act provides the following:

[11] The General Crimes Act admittedly was construed in Ex parte Morgan, 20 Fed. 298 (W.D. Ark. 1883), and Ex parte Kenyon, 14 Fed. Cas. 353 (No. 7720) (W.D. Ark. 1878), to preempt tribal criminal jurisdiction over non-Indians. Neither of the foregoing decisions, however, offered any reasoning in support of its conclusion, and in both cases the statements were mere *dicta*. Furthermore, both opinions endorsed the view, since conceded by all legal authorities to be incorrect, that Indian tribes do not possess jurisdiction over their own members for offenses committed against non-Indians. *See* Vollman, *Criminal Jurisdiction in Indian Country*, 22 U. Kan. L. Rev. 387, 391

[footnote continued]

> Except as otherwise provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. §1152 (1970).

For a number of reasons, which are described with specificity below, the General Crimes Act should not be construed to have preempted tribal authority over crimes committed by non-Indians on reservation lands.[12] On its face the legislation plainly does not

(1974); M. West, *Manual of Indian Criminal Jurisdiction* §D-2, at 63 (1977). Finally, the precedential value of the *Morgan* case, which had denied the assertion of jurisdiction by the Cherokee Nation over even a naturalized Cherokee citizen, was further subverted by the Supreme Court in Alberty v. United States, 162 U.S. 499 (1896), and Nofire v. United States, 164 U.S. 657 (1897), which indicated that Indian tribes possess the authority to exercise jurisdiction over offenses committed by adopted tribal members. Thus, the *Morgan* and *Kenyon* decisions, at best, are of extremely questionable value as support for the conclusion that the General Crimes Act effected a preemption of tribal criminal jurisdiction over non-Indians.

[12] Two opinions rendered by the Attorney General—one of which makes reference to legislation enacted in 1834 that is codified at the present time in the General Crimes Act—do conclude that Indian tribes lack authority over crimes committed by non-Indians on reservation lands. See 7 Op. Att'y Gen. 174

[footnote continued]

preclude Indian tribes from exercising criminal jurisdiction over non-Indians. Instead, it merely provides for federal jurisdiction with respect to crimes committed in Indian country—while expressly stipulating that such authority does not extend to offenses committed by one Indian against another, to any Indian who has been punished under tribal law,[13] or to those situations where treaty provisions accord tribes exclusive powers.

(1855); 2 Op. Att'y Gen. 693 (1834). In both opinions, however, which considered the specific question whether the Choctaw Nation had criminal jurisdiction over non-Indians, the Attorney General appears to have relied upon explicit provisions contained in the Treaty of Dancing Rabbit Creek, 7 Stat. 333, that he felt had divested the Nation of such authority. The Attorney General's action, therefore, was not inconsistent with the proposition that, except as expressly limited by a federal treaty or statute, Indian tribes have criminal jurisdiction over offenses committed by non-Indians on reservation lands.

[13] The *amicus curiae* Kitsap County argues that this specific provision, which was added to the General Crimes Act by legislation enacted on March 27, 1854, 10 Stat. 269, to avoid double jeopardy problems, represents further evidence that tribal criminal jurisdiction did not extend to non-Indians. Specifically, Kitsap County's contention is that, if Indian tribes had possessed authority over offenses committed by non-Indians, Congress would not have limited its 1854 amendment of the General Crimes Act to Indians.

The legislative history of the 1854 Act provides substantial support for the proposition that the omission of any reference to non-Indians represented mere oversight and not a studied decision that no reference need be made to non-Indians because they were not subject to tribal criminal jurisdiction. First, the 1854 amendment to the General Crimes Act took place in the midst of long and heated debate on the Kansas-Nebraska bill, and, quite literally, consumed only minutes of Congress' time. Second, the sole example which was offered during floor debate to justify the amendment involved an Indian and not a non-Indian. Thus, in considering the 1854 Act, Congress really had neither the time nor the occasion to consider in a thoughtful manner whether the legislation should make reference to non-Indians as well as Indians. *See generally* 32 Cong. Globe 700-01 (1854).

Despite the fact that the affirmative grant of jurisdiction contained in the foregoing statute is nowhere stated to be exclusive, petitioners appear to assume, totally without foundation in light of established legal principles, that federal power operates to the exclusion of tribal authority. In *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936), the Supreme Court emphasized the "general rule that the grant of jurisdiction to one court does not, of itself, imply that the grant of jurisdiction is to be exclusive."

Moreover, on its face the General Crimes Act negates the conclusion that federal jurisdiction is to be exclusive. Specifically, the statute provides that federal jurisdiction shall not extend to "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe. . . ." 18 U.S.C. §1152 (1970). Thus, Congress clearly contemplated that, at least with respect to offenses committed by Indians against non-Indians, tribal and federal jurisdiction was concurrent. *See* M. WEST, MANUAL OF INDIAN CRIMINAL JURISDICTION §D-2, at 63 (1977). Nothing on the face of the statute provides support for the proposition that Congress' contemplations were different concerning crimes committed by non-Indians.

The legislative history of the General Crimes Act also argues against the alleged Congressional preemption of tribal jurisdiction over crimes committed by non-Indians on reservation lands. The Trade and Intercourse Act of 1834, which represents the primary legislative antecedent for the current provisions in section 1152, originally was introduced as one of three related Indian bills.[14] The legislative package contained bills which (1)

[14] The provisions which at the present are codified in 18 U.S.C. §1152 appeared in section 25 of the trade and intercourse bill. See H.R. 489, 23rd Cong., 1st Sess. (1834).

reorganized the Department of Indian Affairs; (2) provided for the regulation of trade and intercourse with Indian tribes; and (3) authorized the organization and establishment of a Western Territory which would be reserved exclusively to Indian tribes.[15] See H.R. 490, 23rd Cong., 1st Sess. (1934); H.R. 489, 23rd Cong., 1st Sess. (1934); H.R. 488, 23rd Cong., 1st Sess. (1834). The House Committee on Indian Affairs clearly contemplated that the three bills were interrelated and effected the establishment of a "system" of laws regulating Indian affairs:

> These relations, though subjects of different bills, are intimately connected. They are parts of a system, and of a system which is itself, also, intimately acquainted with the general legislation of the country. [The Committee members] have, therefore, deemed it proper to present, in the same report, their view on the subject embraced in the several bills.

H.R. REP. No. 474, 23rd Cong., 1st Sess. 1 (1834).

The Western Territory bill recognized that, with certain very narrow qualifications, Indian tribes possessed jurisdiction over crimes committed by non-

[15] The Western Territory bill and the trade and intercourse bill followed very closely recommendations which had been made by the Commissioners of Indian Affairs West in a report to the Secretary of War dated February 10, 1834, which suggested the following:

> . . . [T]he municipal laws of the tribes may be enforced; and, should the laws of the tribes and the laws of the United States give concurrent remedies, this would create no difficulty. It is, indeed, desirable to encourage the several tribes to adopt salutary laws, as far as possible, and render less frequent the intervention of Government. . . .

Document "T", H.R. Rep. No. 474, 23rd Cong., 1st Sess. (1834).

Indians on Indian lands.[16] Section 9 of the proposed legislation, for example, provided the following:

> . . . [I]n all cases when a person not a member of any tribe shall be convicted of an offense, the punishment whereof by the laws of the tribe shall be death, the judgment shall be forthwith reported to the Governor, who may for good reasons suspend the execution thereof until the pleasure of the President shall be known.

H.R. 490, 23rd Cong., 1st Sess. (1834). *Accord*, 10 REGISTER OF DEBATES IN CONGRESS 4767, 4771, 4775 (1834).

Furthermore, the legislative history of the Western Territory bill confirms the foregoing conclusion concerning recognition of tribal criminal jurisdiction over non-Indians. The committee report on the proposed legislation contained the following:

> The right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations.
>
> Officers and persons in the service of the United States, and persons required to reside in the Indian

[16] The Western Territory bill was tabled in 1834 for further consideration at the next session of Congress, and ultimately was not enacted into law. The legislative history of the proposed legislation, however, reveals that the issue of tribal jurisdiction over non-Indians played no significant role in preventing enactment. The result turned, instead, on misgivings about the form of government proposed for the territory, unabashed appeals to racism, and concerns about the amount of lands which were to be included in the territory. 10 Register of Debates in Congress 4768-72, 4775-77, 4777-79 (1834).

> country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely traveling in the Indian country the same protection is extended. . . .
>
> As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.

H.R. REP. NO. 474, 23rd Cong., 1st Sess. 18 (1834).

The legislative history of the Trade and Intercourse Act reveals identical Congressional assumptions concerning tribal criminal jurisdiction over non-Indians. Specifically, the committee report on the Trade and Intercourse Act contained the following:

> In consequence of the change in our Indian relations, the law relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision. By the Act of 3rd March, 1817, the criminal laws of the United States were extended *to all persons* in the Indian country, without exception, and by that act, as well as that of 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses commited by or against Indians, of which the tribes have exclusive jurisdiction; *and it is rather of courtesy than of right that we undertake to punish crimes committed in part by and against our own citizens.* [Emphasis added in part and original emphasis in part.]

H.R. REP. NO. 474, 23rd Cong., 1st Sess. 13 (1834). Thus, as in the case of the Western Territory bill,

Congress did not perceive provisions in the trade and intercourse legislation, which ultimately became the modern General Crimes Act, to be inconsistent with the continued exercise by Indian tribes of concurrent criminal jurisdiction over offenses committed by non-Indians.[17]

---

[17] The *amicus curiae* Kitsap County also argues that judicial treatment of the Major Crimes Act, 18 U.S.C. §1153 (1970), which confers on federal courts jurisdiction over certain "major" offenses committed by Indians in Indian country, is consistent with the proposition that the General Crimes Act preempted tribal jurisdiction over non-Indians. Specifically, Kitsap County contends, after assuming that 18 U.S.C. §1153 prevents concurrent tribal jurisdiction over major crimes, that "[i]t is difficult to understand how Congress would preclude tribes from exercising jurisdiction over major crimes committed by Indians, but allow tribes to exercise jurisdiction over non-Indians for the same major crimes." Brief for *Amicus Curiae* Kitsap County, at 47-48.

The flaw in Kitsap County's argument is the assumption that 18 U.S.C. §1153 prohibits Indian tribes from exercising concurrent jurisdiction over major crimes. Although *dicta* does exist in a few cases which supports the foregoing conclusion, the question has never been addressed directly by the federal courts. *See generally* Felicia v. United States, 495 F.2d 353 (8th Cir. 1974); Sam v. United States, 385 F.2d 213 (10th Cir. 1967); United States v. Cardish, 145 Fed. 242 (E.D. Wis. 1906); United States v. Whaley, 37 Fed. 145 (S.D. Cal. 1888).

Moreover, the legislative history of the Major Crimes Act strongly suggests that Congress, in enacting the statute, intended to preserve concurrent tribal jurisdiction. The bill, as originally proposed, provided that Indians charged with committing the enumerated offenses "... shall be tried therefor in the same courts and in the same manner *and not otherwise*, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively." (Emphasis added.) 16 Cong. Rec. 934 (1885).

The bill, however, subsequently was amended on the floor of the House of Representatives based upon the following justification:

[footnote continued]

C. The Indian Civil Rights Act of 1968 and its legislative history do not provide support for the proposition that tribal criminal jurisdiction extends only to Indians.

The Indian Civil Rights Act of 1968 and its legislative history do not support the assertions of petitioners that tribal criminal jurisdiction extends only to Indians. The petitioners' specific allegation is that, at the time it enacted the aforementioned legislation, Congress believed that tribal authority with respect to crimes committed on Indian reservations extended only to Indians.

The 1968 Act and its legislative history reveal at once the extreme weakness of petitioners' position. Section 1302 of the Indian Civil Rights Act, for example, provides, in relevant part, the following:

> No Indian tribe in exercising powers of self government shall–
>
> ...
>
> (3) subject *any person* for the same offense to be twice put in jeopardy;

Mr. BUDD. I desire to suggest another modification of the amendment–to strike out the words 'and not otherwise.' The effect of this modification will be to give the courts of the United States *concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases.* [Emphasis added.]

16 Cong. Rec. 934 (1885). If, as the foregoing legislative history indicates explicitly, the Major Crimes Act did not divest Indian tribes of concurrent jurisdiction, then Kitsap County's attempted utilization of 18 U.S.C. §1153 to prove its interpretation of the General Crimes Act is unvalid.

(4) compel *any person* in any criminal case to be a witness against himself;

. . .

(6) deny to *any person* in a criminal proceeding the right to a speedy and public trial. . . .

. . .

(8) deny to *any person* within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . . . [Emphasis added.]

25 U.S.C. §1302 (1970). The repeated references to the phrase "any person" belie the contention that Congress assumed only Indians were subject to the criminal jurisdiction of tribal courts.[18]

Furthermore, the legislative history of the Act, as analyzed in *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968), provides ample support for the foregoing conclusion. In the *Dodge* case the court offered the following views on the derivation of the term "any person" in the Indian Civil Rights Act:

> Initially legislation was proposed that imposed upon Indian tribes the same limitations and restraints as those which are imposed on the federal government by the United States Constitution. Objections to this whole scale application of the Bill of Rights to Indian tribes were voiced in hearings conducted in June, 1965. The Department of the Interior offered a substitute bill that spelled

[18] The *amicus curiae* Kitsap County attempts to avoid this conclusion by arguing that the phrase "any person" was intended by Congress to apply with respect to civil rather than criminal matters. The face of the statute, which employs the term "any person" in what obviously are provisions relating to criminal proceedings, renders Kitsap County's position untenable. *See* 25 U.S.C. §§1302(3), 1302(4), 1302(6) (1970).

> out in specific terms the rights Indians would possess in their relationships with tribal governments. The substitute bill specifically referred to "American Indians" in delineating the rights to be established. *See* Hearings on the Constitutional Rights of American Indians Before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 1st Sess., at 5, 317-18 (1965). In May, 1966, the Department of the Interior submitted supplemental testimony and a revision of the substitute bill that was intended to establish rights for all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians. *See* Summary Report on the Constitutional Rights of American Indians of the Senate Subcommittee on Constitutional Rights of the Committee of the Judiciary, 89th Cong., 2d Sess., at 9-10 (1966). At this point, along with immaterial changes, the term "any person" was substituted for the term "American Indian" throughout the bill that eventually became Title II. That language remained in the bill up to and including the time of its enactment into law.

Id. at 24.

Thus, the Indian Civil Rights Act of 1968 provides no support for the proposition that Congress believed non-Indians to be beyond the reach of tribal criminal jurisdiction. To the contrary, the materials discussed above plainly support precisely the opposite conclusion.

D. The question whether Public Law 83-280 [19] deprived the Suquamish Indian Tribe of criminal jurisdiction over non-Indians need not be considered because, contrary to petitioners' allegations, Public Law 83-280 has no application on the Port Madison Reservation, and is not, therefore, legally relevant in this case.

Finally, petitioners Oliphant and Belgarde argue that Public Law 83-280 has effected an extinguishment of the Suquamish Indian Tribe's jurisdiction over crimes committed by non-Indians on the Port Madison Reservation.[20] The foregoing contention need not be reached because, as the discussion below demonstrates, Public Law 83-280 has no application on the Port Madison Reservation.

Pursuant to section 7 of Public Law 83-280, the State of Washington adopted a statute in 1957 which authorized the State to assume jurisdiction over the Port Madison Reservation when the Governor had received evidence of tribal assent. *See* Rev. Code Wash. §§37.12020-070. The Suquamish Indian Tribe subsequently consented to the exercise of state jurisdiction, and on May 15, 1958, the Governor promulated a

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[19] Pub. L. No. 83-280, 67 Stat. 590, *as modified*, 25 U.S.C. §1321 (1970).

[20] The provisions in Public Law 280 which applied to the State of Washington were set forth in sections 6 and 7. The former gave the consent of the United States to jurisdictions such as Washington "... to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this act...." 67 Stat. at 588. Section 7 allowed states "... not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction ... by affirmative legislative action...." 67 Stat. at 588.

formal proclamation declaring the effectiveness of the State of Washington's authority on the Port Madison Reservation.

In 1968, however, Congress enacted legislation which provided for the retrocession by a state of any jurisdiction it might have assumed previously under Public Law 83-280. *See* 25 U.S.C. §1323 (1970). On August 26, 1971, the Governor of the State of Washington issued a proclamation retroceding to the United States jurisdiction over the Port Madison Reservation. On April 14, 1972, the Secretary of the Interior accepted the State of Washington's retrocession of jurisdiction.[21] *See* 37 FED. REG. 7535 (1972).

The petitioners allege that the State of Washington's retrocession of jurisdiction to the United States was ineffective. Specifically, they contend that the Governor of Washington attempted to effect the return of jurisdiction to the United States in violation of state laws which required the Washington legislature to approve the retrocession.

In *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971), the court rejected a claim which, substantively, cannot be distinguished from the argument made by petitioners in this case. The *Brown* litigation involved the question whether retrocession of state jurisdiction to the United States under 25 U.S.C. §1323 can be legally effective if done in violation of procedures established by state law. The court upheld the validity of the retrocession based upon the following analysis:

---

[21] Pursuant to Executive Order No. 11435, 33 Fed. Reg. 17339, the President designated the Secretary of the Interior as his representative for purposes of exercising the authority conferred upon the United States by 25 U.S.C. §1323.

The federal government, having plenary power over the Indians, had the power to prescribe any method or event it desired to trigger its own re-assumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all.

The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action, are all factors to be considered and lead the Court to the conclusion that the federal interpretation of the effectiveness of state action triggering the re-assertion of federal jurisdiction is and was controlling. "Retrocession" does not imply any particular procedure or action on the part of the states involved and the need for finality and importance of the various competing interests here dictates that the state action presented complies with the federal requirements of "retrocession."

> The federal government, having the power to preempt jurisdiction over the Omaha Reservation, had the power to so define and construe the word "retrocession" as to remove from the determination of federal assumption of jurisdiction any question of the procedural validity or invalidity of the state's act of retrocession. Considering the problems presented by any other holding, the Court holds that the term "retrocession," as determined by the Secretary of the Interior, was fulfilled by such action as the state took in Resolution 37.

Id. at 540-41. *Accord, Omaha Tribe v. Village of Walthill,* 334 F. Supp. 823 (D. Neb. 1971), *aff'd,* 460 F.2d 1327 (8th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973). For

the legal and policy reasons so clearly specified in the *Brown* case, petitioners are not now in a position to question the validity of the State of Washington's retrocession six years ago of jurisdiction over the Port Madison Reservation.

III.

AS A MATTER OF SOUND POLICY, THE JURISDICTION OF INDIAN TRIBES OVER CRIMES COMMITTED BY NON-INDIANS IS ESSENTIAL TO THE ADMINISTRATION OF CRIMINAL JUSTICE ON INDIAN RESERVATIONS.

In addition to the numerous legal grounds supporting tribal jurisdiction over offenses committed by non-Indians on reservations, such tribal authority is compelled by sound policy considerations. First, the quality of law enforcement on Indian reservations, in all probability, will decline significantly if Indian tribes are denied jurisdiction over crimes committed by non-Indians. Second, the exercise by Indian tribes of criminal jurisdiction over non-Indians comports with the dictates of modern federal Indian policy and the requirements of effective criminal justice administration on Indian reservations.

A. The quality of law enforcement on Indian reservations will be affected deleteriously if Indian tribes are prevented from exercising criminal jurisdiction over offenses committed by non-Indians on Indian reservations.

For a number of reasons, the inability of an Indian tribe to exercise criminal jurisdiction over non-Indians undoubtedly would affect adversely the administration of criminal justice on Indian reservations. First, states

historically have been unable or unwilling to commit the resources which are essential to make law enforcement effective on reservation lands. [22] According to materials developed by its own officials, the State of Washington—the protestations of *amicus curiae* Kitsap County in this case notwithstanding—has yet to administer criminal justice efficiently on Indian reservations:

> Although the State assumed jurisdiction over major crimes and juvenile delinquency on reservations, counties have not been provided with resources to effectively assume the responsibilities of patrol, apprehension and investigation of offenses committed on reservations.

"Washington Comprehensive Plan for Law Enforcement" (1972), as quoted in *Hearings on S.2010 before the Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975) (hereinafter cited as *"Hearings"*).

The State of Nebraska, which pursuant to 25 U.S.C. §1323, recently retroceded jurisdiction over certain Indian lands within its borders to the United States, provides a disturbingly similar example. During Congressional hearings on legislation which would have effected the retrocession of all state jurisdiction over Indian reservations and confirmed tribal jurisdiction over non-Indians, the Assistant Attorney General for

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[22] Despite the fervor with which petitioners and the *amici curiae* supporting them embrace additional jurisdiction on Indian reservations in this case, states to date have been anything but enthusiastic about extending their authority over Indian lands. Under Public Law 280, few of the nineteen "optional" states—those which had a choice about assuming jurisdiction—were able to muster the necessary support to assert complete jurisdiction over Indian reservations within their boundaries.

the State of Nebraska offered the following explanation of why criminal jurisdiction over the Omaha Indian Reservation had been retroceded:

> Well, I think that first the Indians wanted it, and secondly, Thurston County, which is located there, was having financial problems enforcing the law, and I think they felt that the Federal Government was going to take over the law enforcement functions on the Omaha Reservation and they would be able to afford it better.

Hearings, at 484.

The foregoing assessment of the State of Nebraska's difficulties in financing effective law enforcement on Indian reservations has been confirmed in materials prepared by the Nebraska legislature. Specifically, the Judiciary Committee Interim Report of 1975, which was entitled "Indian Retrocession", offered the following justification for returning criminal jurisdiction to the United States: "after several years, it became apparent that local government could not support the additional demand for law enforcement personnel and services in those areas affected as a result of the jurisdictional change." *Hearings*, at 525.

The unfortunate results of the states' historical unwillingness or inability to implement effectively their criminal jurisdiction on Indian reservations are not visited solely on Indians, but, in addition, adversely affect the lives of non-Indians as well. As the Chairwoman of the Campo Reservation in California recently explained:

> We don't get any great services . . . but neither does the White community up there. . . . We're in a very isolated corner of San Diego County and what we do get out there isn't the cream of the

> crop, as far as the Sheriff's Department goes. That goes for the White community as well as the Indian reservation out there.

Am. Indian Policy Review Comm, *Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report* 16 (1976) (hereinafter cited as "Task Force Report").

The District Attorney for Umatilla County, Oregon, in Congressional testimony affirming the need for tribal criminal jurisdiction over non-Indians, offered telling support for the proposition that states are incapable of maintaining law and order adequately on Indian reservations:

> Our county consists of over 3200 square miles and our reservation is some 286,000 acres. With these vast acres, State and county law enforcement simply cannot provide the protection it ought to be providing. This applies both to the Indian and to the non-Indian living on or passing through the reservation. . . . It would be naive to suppose that there will be no problems. The present situation is one of these; and that is the virtual no-man's land of confusing jurisdiction found on many reservations.

Hearings, at 563. In light of the foregoing, Indian tribes are understandably and quite justifiably reluctant to assume that, in marked contrast to contrast to their past performance,[23] states will commit adequate law enforcement

[23] As the Supreme Court itself has emphasized, racial discrimination in state law enforcement activities on Indian reservations historically has plagued relations between Indians and non-Indians. *See* United States v. Kagama, 118 U.S. 375 (1886). The following example clearly demonstrates, unfortunately, that the foregoing issue has not been relegated to history:

> The Soboba Band of Mission Indians in California complained of police harassment along with their allegations of inadequate service. The situation was so bad—failure of the local police to protect reservation lands from non-Indian trespassers and subsequent loss of cattle—that the Indians took to providing armed guards to protect their lands. . . . It is a persistent complaint that even where law enforcement services are provided on the reservation, the police are less than willing to enforce the law against non-Indians.

Am. Indian Policy Review Comm'n, *Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report 18* (1976).

[footnote continued]

resources to reservation areas if Indian tribes are denied the right to exercise criminal jurisdiction over non-Indian offenders.[24]

Even assuming, however, that states do commit the resources necessary to ensure effective law enforcement on Indian reservations, a second reason exists for concluding that the quality of law and order on Indian lands will deteriorate. Specifically, as the following hypothetical so aptly illustrates, denying to Indian tribes the authority to exercise criminal jurisdiction over non-Indians makes the rational administration of a criminal justice system on Indian reservations impossible:

[24] The denial of tribal authority over crimes committed by non-Indians causes especially intractable law enforcement problems where matters uniquely "Indian" are involved. Non-Indian police officers, for example, frequently have shown gross insensitivity to tribal requests that certain reservation sites of historic or ceremonial importance be protected from non-Indian intruders:

> '. . . [T]he question frequently arises as to whether our tribal police can arrest non-Indians who commit offenses on the reservation which would be punishable under tribal law if committed by tribal members. This question arises with reference to . . . [d]esecrating or interfering with tribal graveyards, both historic and prehistoric in the non-Indian sense, and the desecration or interference with areas of the reservation having substantial religious significance to the tribe.'

Task Force Report, at 99.

> If a burglary of a non-Indian owned residence or business occurs and the perpetrator of the crime is unknown, who is obligated to investigate the crime? Obviously, if the perpetrator of the crime was known to be an Indian, then the tribal or federal government would have jurisdiction. If the perpetrator is unknown, the question of jurisdiction is uncertain. If the Sheriff or state officer attempts to investigate the crime, at what point must he cease his investigation? If he has reason to believe that the perpetrator is an Indian? Can or should he drop his investigation on the basis of hearsay? Or must he continue to a point somewhere short of filing criminal charges? Of course, the converse is also true where the Indian tribal police or federal officers investigate and where there is reason to believe that the perpetrator is a non-Indian.

Hearings, at 501.

B. The exercise by Indian tribes of criminal jurisdiction over non-Indians comports with the dictates of modern federal Indian policy and the requirements of effective criminal justice administration on Indian reservations.

An affirmation of tribal criminal jurisdiction over non-Indians not only would avoid the unfortunate events described in detail above, but it also would be completely consistent with modern federal Indian policy and the requirements of effective criminal justice administration on Indian reservations. A succinct and accurate summary of the fundamental tenets of current federal Indian policy appears in the preamble of the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C.A. §§450 *et seq.* (1977 Supp.).

> . . . Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons.
>
> * * * * *
>
> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy. . . .

25 U.S.C.A. §§450, 450 a (1977 Supp.).

Consistent with the foregoing policy declaration, the Bureau of Indian Affairs of the Department of the Interior recently has taken a number of steps, including additional funding, to upgrade tribal judiciaries and law enforcement systems. *See generally* INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS (American Indian Lawyer Training Program, Inc., 1977).

Furthermore, the tribal courts which have exercised jurisdiction over non-Indians have done so successfully and, in virtually all instances, without complaint from non-Indian defendants. The Gila River Indian Community Court near Phoenix, Arizona, for example, has asserted certain types of criminal jurisdiction over non-Indians since 1972, and to date its authority has never been challenged. Task Force Report, at 2.

Significantly, in the State of Washington, additional evidence of non-Indian satisfaction with tribal law enforcement capabilities exists. As a Councilwoman of the Makah Tribe recently testified before Congress:

> With respect to law and order . . . [t]he Tribe has in fact taken over this function with the silent acquiescence of county officials. Our tribal police are in fact managing all traffic enforcement on the Reservation, even though this was one of the areas expressly claimed by the State of Washington under its Act taking jurisdiction under Public Law 83-280.

Hearings, at 348. Furthermore, on the Colville Reservation in Washington, tribal law enforcement has proved so effective that the city of Nespelem, which is overwhelmingly non-Indian, contracts for police services with the Confederated Colville Tribes.

In light of the foregoing discussion, a number of important conclusions can be drawn. First, law enforcement for both Indians and non-Indians on reservations will be affected deleteriously if Indian tribes are denied criminal jurisdiction over non-Indians. Second, the exercise of such jurisdiction by Indian tribes is consistent with modern federal Indian policy, which has encouraged tribes to strengthen their institutions of government, including tribal courts, to make Indian self-determination a reality. Finally, the performance of tribal courts to date in exercising criminal jurisdiction over non-Indians hardly justifies the parade of horribles which appears in the briefs of petitioners and the *amici curiae* supporting them. See Brief for Petitioners, at 72-80, Brief for Attorney General, State of Washington, at 28, 31; Brief for State of South Dakota, at 3, 4; Brief for Kitsap County, at 17-20.

CONCLUSION

Except as expressly limited by a federal treaty or statute, an Indian tribe possesses jurisdiction over all crimes committed within the boundaries of its reservation. No federal treaty or statute has limited the authority of the Suquamish Indian Tribe over offenses committed by non-Indians on the Port Madison Reservation, and the Tribe, therefore, has the power to exercise jurisdiction with respect to crimes committed by non-Indians within its reservation boundaries. As a matter of sound policy, the jurisdiction of Indian tribes over crimes committed by non-Indians is essential to the administration of criminal justice on Indian reservations.

For the foregoing reasons, *amici curiae* respectfully urge that the decision below be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE LUMMI INDIAN TRIBE, QUINAULT INDIAN NATION

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BRIEF FOR AMICI CURIAE LUMMI INDIAN TRIBE, QUINAULT INDIAN NATION

MOTION FOR LEAVE TO FILE AMICI CURIAE AND STATEMENT OF CONSENT

The Lummi Indian Tribe and the Quinault Indian Nation have sought and received consent from attorneys for petitioners and respondents in this matter. Letters of consent are on file with the clerk of this Court.

The Lummi Indian Tribe and the Quinault Indian Nation hereby request leave of the Court to file a brief Amici Curiae supporting the position of the Suquamish Indian Tribe.

INTEREST OF AMICUS CURIAE QUINAULT INDIAN NATION

This Amicus Brief is submitted in part by the Quinault Indian Nation of the Quinault Indian Reservation, Washington. The Quinault Nation is an organized, self-governing, federally recognized Indian tribe. *United States v. Washington*, 384 F. Supp. 312 (1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), and is a successor to signatory tribes of the Treaty of Olympia, 12 Stat. 971, II KAPP. 719 (1855).

The Quinault Indian Nation governs a 200,000-acre reservation on the Olympic Peninsula within the boundaries of the State of Washington. The reservation is heavily forested and three small villages constitute its only sites of resident population. Approximately 2,500 persons reside on the reservation; approximately 600 are non-Indian. One-third of the lands on the reservation are in fee status and two-thirds are held in trust by the United States for individual allottees and the Tribe. The fee lands are scattered around the reservation in a random, checkerboard pattern.

A substantial forestry industry operates on the reservation bringing large numbers of non-Indians to the reservation each day. Many hundreds of miles of road cross the reservation, and four rivers and a large lake are within the reservation boundaries.

Law enforcement is almost exclusively provided by a force of some sixteen tribal and Bureau of Indian Affairs police officers. Even the federal highway which passes through the reservation in various places is rarely patrolled by State of Washington patrolmen, because it is too remote from state substations to allow for routine patrol.

The Quinault tribal court, consisting of tribal and appellate divisions, is established under the Quinault Constitution and tribal code as an independent branch of the tribal government. The Court sits daily at the village of Taholah and has its judicial roots in the Tribal Fisheries Court established in 1917. The Quinault Nation employs a prosecutor and a defender; the defender represents any person requesting his or her services.

The Quinault Nation began taking jurisdiction over non-Indians in some land-use matters in 1967. In 1969, pursuant to the enactment of tribal trespass ordinances to protect the beaches and waters of the reservation, the Quinault Nation took jurisdiction over non-Indians involved in various criminal trespass offenses on the reservation.

On March 31, 1973, the Quinault Nation adopted a revised tribal code which assumes civil and criminal jurisdiction over all persons acting within the boundaries of the reservation. The Quinault Nation could then adequately protect all persons and property within its territory, as well as the lands and waters, forests and wildlife. Without such jurisdiction, the only practical remedy the Tribe would have for violation of its laws regarding hunting, fishing, timber theft, business licensing, and misdemeanor crimes, would be to exercise its specific treaty power to expel from the reservation all non-Indians it found to be undesirable. Resort to the federal courts for such minor offenses would be difficult, not only in distance (between 100-150 miles), but in obtaining the interest and participation of federal prosecutors in such distinctly reservation matters.

Since 1969, numerous petty offenses committed by non-Indians on the Quinault Indian Reservation have been

dealt with through the mechanism of the Quinault Tribal Code and the Quinault tribal courts. Cases of a civil nature brought by or against non-Indians in the Quinault courts are less frequent, but have been steadily increasing in the past four or five years. 1977 tribal court statistics show that about one-third of the criminal cases and one-half of the civil cases involve non-Indian parties.

Cases are tried to the court and to juries of six persons drawn from all of the Indian and non-Indian residents on the Reservation.

INTEREST OF AMICUS CURIAE LUMMI INDIAN TRIBE

The Lummi Indian Tribe joins with the Quinault Indian Nation in submitting this Amicus Brief. The Lummi Indian Tribe is a federally recognized Tribe of American Indians signatory to the Treaty of Point Elliott, 12 Stat. 927, II KAPP. 697 (1855), and organized under a Constitution and By-Laws approved by the Secretary of the Interior.

The Lummi Tribe governs the Lummi Indian Reservation, located some ten miles northwest of the City of Bellingham, Washington. Of the 12,000 acres within the Reservation, some 5,000 acres are tidelands owned in trust by the United States for the Tribe; some 3,500 acres are owned in trust for the Tribe and individual Indians; and some 2,500 acres are owned in fee by individual non-Indians. The fee patent acres are scattered throughout the upland area. Portage Island, a 1,000-acre island within the Reservation, is owned by the Whatcom County Park Board, and is intended to be a major park facility serving large numbers of non-Indian persons. The Park Board maintains no independent park police.

The Reservation serves as a home for approximately 1,800 Indian people, most of whom are supported by fishing or through tribal employment. Some 2,000 non-Indians are permanent residents of the Reservation; they commute to Bellingham or nearby factories. A substantial seasonal population, as many as 2,000 more non-Indians, stay on the Reservation during the summer. The northern boundary of the Reservation is a major arterial highway. Whatcom County operates a ferry from Lummi Island (off the Reservation) to the Reservation. Several hundred people live on the Island and the ferry is the only access.

In 1974, the Lummi Tribal Code was amended to take misdemeanor and traffic jurisdiction over all persons within the Reservation. The amended code has been approved by the Secretary of the Interior. The Lummi Reservation Court, consisting of trial appellate branches, operates under this Code. *See, Tom v. Sutton*, 523 F.2d 1101 (9th Cir. 1976). In 1977, approximately 25% of traffic offenses and 15% of other criminal cases involved non-Indians; and 23% of the civil actions had non-Indian parties. The Lummi Tribe employs a prosecutor and a defender; the defender is available without charge to any person accused of committing a crime.

The Lummi Tribe and the Bureau of Indian Affairs employs 8 police officers and 5 fisheries officers to patrol the Reservation. There are no Whatcom County deputy sheriffs who are regularly assigned to the Reservation, and the Washington State Patrol patrols only the State highway bordering the Reservation.

ARGUMENT

Introduction

Amici will discuss the doctrine of tribal sovereignty as used by this Court. A number of recent decisions together with several leading earlier opinions, will be analyzed. This Court's consistent use of the residual tribal authority stemming from original tribal sovereignty and not from the United States Constitution or from Congressional acts will be demonstrated.

Amici present this discussion to aid in answering the narrow question at the heart of this case; does the residual sovereignty of the Suquamish Indian Tribe include that petit criminal jurisdiction over non-members which is necessary to preserve the peace on the Port Madison Reservation?

Throughout the history of the United States this Court has recognized that Indian tribal governments retain governmental powers not based on the Constitution or laws of the United States. Those tribal governmental powers are based upon the sovereign powers exercised by the tribes prior to the coming of the Europeans to the North American Continent. This Court has recognized that these powers are not divested without specific Congressional enactment and has called them dependent-sovereign or quasi-sovereign powers.

Petitioners err when they contend that the very limited criminal jurisdiction that the Suquamish Tribe seeks to have confirmed in these cases cannot be confirmed without a showing of specific Congressional grant of petit criminal

jurisdiction to Indian tribes. The tribal power is grounded in the residual sovereignty of the tribes.

Petitioners err when they claim that because the Congress can remove or limit the residual sovereignty of the tribes, that residual sovereignty therefore does not exist.

Petitioners err when they claim that residual sovereignty is a "mere veil" used only to cloak the doctrine of federal preemption when tribal interests are infringed upon by actions of the states.

Legal and Practical Effects of Petitioners' Theories

Accepting petitioner's arguments may require overruling *Talton v. Mayes*, 163 U.S. 376 (1896), and upsetting a coherent body of law established in *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1 (1831), and stretching to last term's decision in *Puyallup Tribe v. Washington Department of Game*, ... U.S. ....., 53 L. Ed. 2d 667 (1977).

A number of serious practical problems immediately arise if petitioners are correct in their formulations, not the least of which involves tribal jurisdiction over crimes committed an trust land by its own members. There is no federal statute granting the tribe criminal jurisdiction over crimes committed by Suquamish Indians on the Port Madison Reservation, nor is such specifically reserved to the Tribe by the Treaty of Point Elliott, 12 Stat. 927, II KAPP. 697 (1855). *See* 18 U.S.C. §1152. The federal courts have no cognizance of the crime. *See*, 18 U.S.C. §1153, *Ex Parte Crow Dog*, 109 U.S. 556 (1883). (In *Crow Dog*, this Court assumed the existence of exclusive tribal jurisdiction without a federal grant to the Tribe. *See*, discus-

sion *infra.*) Thus, under petitioners' logic, there would be no government able to keep the peace on Indian reservations absent some positive Congressional grant of authority. Reservations would be without law enforcement as regards minor crimes involving only Indians.

Analysis of Modern Supreme Court Decisions

This Court most recently dealt with tribal sovereignty in *Puyallup Tribe v. Washington Department of Game*, ... U.S. ....., 53 L. Ed. 2d 667 (1977). The Puyallup Tribe interposed its sovereign immunity from suit against an action by the State of Washington. This Court did not hesitate to uphold that assertion of sovereign immunity by the Tribe. ..... U.S. ....., 53 L. Ed. 2d at 674. No federal statute conveyed such immunity from suit to the Puyallup Tribe, nor can it be argued that such a specific and pervasive immunity is the result of some statutory scheme of federal tribal relations.

Thus, if tribal sovereign immunity exists, it must be based upon the existence of a tribal governmental entity capable of maintaining and asserting its own sovereignty. *See, United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

In *United States v. Antelope*, ... U.S. ....., 51 L. Ed. 2d 701 (1977), this Court was faced with a challenge to the Major Crimes Act based on the supposed racially discriminatory classification separating Indians from other citizens. Relying on the inherent authority of tribal governments, this Court repeated with favor the language of *United States v. Mazurie*, 419 U.S. 544 (1975):

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515 (1832); they are a separate people possessing the power of regulating their internal and social relations. . . . 419 U.S. 544, 557, 51 L. Ed. 2d at 707.

Discussing the use of federal law in dealing with Indians, this Court stated that Congress may legislate even in a fashion which denies Indians a benefit or privilege to non-Indians. Such Congressional action cannot be defeated by claiming that this denial is an impermissable racial classification, because the classification is not based on race, but on the unique status of the members of Indian tribes as separate people "with their own *political* institutions. Federal regulation of Indian tribes, therefore, is governance of once sovereign political communities." 51 L. Ed. 2d at 707. (Emphasis added).

If those tribal political institutions did not remain intact, this Court would not rely on them to decide the jurisdictional framework in which a serious criminal charge is to be determined. Once again, however, no indication is given of any specific federal statute which grants to Indian tribes the governmental powers that have been denoted as quasi-sovereignty.

In *Fisher v. District Court*, 424 U.S. 382 (1976), this Court upheld the power of the Northern Cheyenne Tribal Court to adjudicate the rights of reservation Indians residing on the reservation in adoption matters.

> In 1935, the (Northern Cheyenne) Tribe adopted a Constitution and By-Laws pursuant to §16 of the Indian Reorganization Act, 48 Stat. 987, 25 U.S.C. §476, a statute specifically intended to encourage Indian tribes to *revitalize* their self-government. *Mescalero*

> *Apache Tribe, supra,* at 151. 425 U.S. at 387. (Emphasis added).

Significantly, this Court has continued to choose the word "revitalize" in discussing the impact of the Indian Reorganization Act on tribal government. The prior existence of tribal governmental power is unquestioned. More importantly, though, the continuing power of the tribal government to assert sovereign authority over the domestic relations and child custody relationships among persons on the reservation is unquestioned.

Where did this sovereign power relied upon in *Fisher* come from? There is no federal statute conferring such jurisdiction on tribal governments. Section 16 of the Indian Reorganization Act allows tribes electing to come under the Act to adopt a Constitution. That section does not, however, specify the content of the Constitution and its specific terms deal only with the employment of legal counsel, the use of tribal lands, and negotiations with other governments.[1]

The Constitution of the Northern Cheyenne Tribe is the basis for the power exercised by the tribal court in *Fisher.* That Constitution must be asserting powers pursuant to that portion of §16 which says:

> In addition to all powers vested in any Indian tribe or tribal council *by existing law* . . . . *See,* 55 I.D. 14 (1934). (Emphasis supplied)

If there is no existing federal law granting tribes power to deal with domestic relations and child custody, the existing law referred to must be that of the Tribe. The ap-

1. The Northern Cheyenne Tribal Code as cited in *Fisher, supra,* appears to assert some jurisdiction over non-members and non-Indians when such persons are involved in an attempt to adopt a Northern Cheyenne child.

proval of existing tribal law must be considered the recognition of residual, or inherent, sovereignty which has not been removed by Congress.

This is not to say that Congress could not remove this authority and grant it to the states or to some federal agency. In *Fisher,* this Court recognized several times that the quasi-sovereignty maintained by the Northern Cheyenne Tribe is both at the pleasure of, and protected by, the federal sovereign.

But until the federal sovereign acts to remove such power from the Tribe, *Fisher* at 388, the Tribe continues to exercise it when the relevant incidents occur within the territorial boundaries of the reservation. *Fisher, supra* n. 14.

In *United States v. Mazurie,* 419 U.S. 544 (1975), this Court did not decide whether the independent authority of the tribe to regulate the distribution and use of intoxicants on the reservation was in itself sufficient to impose a regulatory scheme upon non-Indian retailers of alcohol and beverages. 419 U.S. at 557. Tribal authority over the reservation independent of the federal statute was recognized, however, and the source of that authority was not conceived to be a federal grant of power from statute or treaty.

To support the recognition of the independent tribal power, the Court, instead of looking to treaties or federal law, looked instead to the analysis of tribal powers found in *Worcester v. Georgia,* 6 Pet. 515 (1832); *United States v. Kagama,* 118 U.S. 375 (1886); and *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973). In none of these cases is independent tribal authority related to any federal grant of power.

If there is no grant of federal power, the source of tribal authority discussed by this Court in *Mazurie* must be within the governmental power of the Tribe itself. Undoubtedly tribal governmental power may be and is limited by federal law and treaties.[2] Similarly, however, there is no law or treaty prohibits the Suquamish Tribe from exercising petit criminal jurisdiction over all persons who enter its Reservation.

In *Mazurie*, this Court explained that *Williams v. Lee*, 358 U.S. 217 (1959), had considered the problem of tribal governmental assertions of jurisdiction over non-Indians acting within the boundaries of the Reservation. 419 U.S. at 558. According to the *Mazurie* Court, *Williams* found that the Navajo Nation retained jurisdiction over non-Indians, not because of a grant of federal authority, but because the federal government had recognized the Navajo governmental authority over their Reservation by concluding a treaty with that Tribe in 1868. *Id.* As in the Treaty with the Navajo, there is no formal or specific recognition of tribal government power over non-Indians in the Treaty with the Suquamish.

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court recognized "the unique legal status of Indian tribes under federal law," 417 U.S. at 551, and drew upon the status of certain Indians "as members of quasi-sovereign tribal entities," 417 U.S. at 554, to determine that federal statutes providing for employment preference in the Bureau of Indian Affairs for members of federally recognized tribes was not racially based and therefore not fatally invidious

2. For example, Petitioners here, over and above the due process safeguards of the Suquamish Tribal Code and Constitution, are protected by the due process provision of 25 U.S.C. §1302.

discrimination. Again, there was no statute that the Court could or did point to which would require recognition of Indian tribes as the political entities the Court described. The limited sovereignty of the Tribe was simply noted and accepted by the Court after reciting the legal precedent for recognizing the existence of such tribal polity.

In both *Mazurie* and *Mancari* the doctrine of tribal sovereignty is not relied upon by this Court to avoid assertions of state jurisdiction on reservations. If tribal sovereignty were a "mere veil" for federal preemption, this Court could not have cited the doctrine as a basis for its holdings.

In *Keeble v. United States*, 414 U.S. 205 (1973), this Court recognized the jurisdiction of the tribal courts as "residual." 412 U.S. at 209, 214. This Court required that a lesser included offense instruction be given in a federal prosecution for a violation of the Major Crimes Act, 18 U.S.C. §1153, even though that lesser included offense, under the federal statute limiting the jurisdiction of federal courts to Major Crimes Act offense, could only be charged in a tribal court. In a careful examination of federal and tribal court jurisdiction on Indian reservations, this Court found no federal statutes granting judicial power to Indian tribes. Tribal judicial power could only be characterized as a portion of the quasi-sovereign "residual" power of a federally recognized Indian Tribe.

Once again, this Court used the doctrine of limited tribal sovereignty not to defeat state assertions of jurisdiction on the reservation, but to determine a question of federal law.

In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), this Court while not basing its decision on the

concept of residual sovereignty, discusses this doctrine at length. The opinion does not deny its relevance to the question of whether a state tax might be successfully levied on the income of a reservation Indian earned on the reservation. Instead this Court stated that while the conceptual clarity of Chief Justice Marshall's opinion in *Worcester v. Georgia, supra,* had been modified to deal with changed circumstances and the legitimate interests of states in regulating the affairs of non-Indians on the reservation:

> From the very first days of our government, the federal government has been permitting the Indians largely to govern themselves, 411 U.S. at 170.
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution to the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long pre-dates that of our own government.

411 U.S. at 172.

The opinion in *McClanahan* cited with approval statements in *United States v. Kagama, supra,* which recognized the limited sovereignty of Indian tribal governments, and in *Williams v. Lee, supra,* which allowed that limited sovereignty to be asserted over non-Indians.

The importance of limited tribal sovereignty in *McClanahan* cannot be denied, since this Court found no affirmative statement in any statute or treaty protecting the Navajo Indians from the tax claims of the State of Arizona, but instead stated near the end of the opinion:

> We are far from convinced that when a state imposes taxes upon reservation members without their consent,

> its action can be reconciled with tribal self-determination.

411 U.S. at 179. Thus, while the *McClanahan* decision is used to argue that limited sovereignty of tribal government has somehow disappeared because of changed circumstances, it is difficult to see how the *McClanahan* conclusion relating to the tax immunity of reservation Indians might have been reached without dependence upon the historic and legal recognition of limited and inherent tribal sovereignty.

Analysis of Basic Supreme Court Decisions

The older decisions of this Court have utilized the doctrine of tribal sovereignty in a number of different areas over the past century-and-a-half. Selected leading cases will be analyzed in the following pages.

Cherokee Nation v. Georgia, 5 Pet. (30 U.S.) 1 (1831), was an original action in this Court in which the Cherokee Nation claimed to be either a foreign state or a state of the Union with the Constitution. In denying either status, Chief Justice Marshall declared the Nation neither fish nor fowl, but a "domestic dependent nation," whose "relation to the United States resembles that of a ward to his guardian." 5 Pet. at 16. Indian tribes are not foreign nations, *not because they are not nations,* but because they are *not foreign.* 5 Pet. at 19. The Court left open the question of which governmental powers the Cherokee Nation retained and exercised, but clearly recognized that a quantum of residual sovereignty and governmental power was retained by the Cherokee Nation. There was, of course, no federal statute granting to the Nation that power.

The next term, in *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832), the Chief Justice enunciated the touchstone for determining the residual powers of an Indian tribe: Indian tribes in the first instance possessed all natural rights of independent political communities; when they came under the protection of a stronger power, they relinquished some of these powers; what was not surrendered or removed remains. 6 Pet. (31 U.S.) at 559-61. Only positive enactments by the conqueror alter the laws of a conquered state. *Wall v. Williamson*, 8 Ala. 48, 51 (1845). In *Worcester*, this Court recognized that one of the residual powers of tribes was to permit persons to travel and preach within their own territory.

Affirming the necessity of positive Congressional action to deprive an Indian tribe of its criminal jurisdiction, this Court in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), released an Indian convicted of murdering another Indian within the Sioux Reservation on the grounds that the Tribe had *exclusive* jurisdiction over the crime. While acknowledging that Congress had undoubted power to remove this jurisdiction from the Tribe, without such legislation, the Tribe retained this portion of its original sovereignty. (Congress acted with dispatch, Act of March 3, 1873, 23 Stat. 385, §9).

The validity of this Act (The Major Crimes Act, now 18 U.S.C. §1153) was soon questioned in *United States v. Kagama*, 118 U.S. 375 (1886). Kagama, an Indian, was accused of murdering another Indian within the Hoopa Reservation in California. This Court sustained the indictment against challenges to the constitutionality of the statute and to the interference with the exclusive jurisdiction

of the Tribe. These challenges were rejected using the analyses found in *Cherokee Nation v. Georgia, supra*, and *Worcester v. Georgia, supra*. Since tribes are dependent sovereigns, the general sovereign can enact laws for the dependent's benefit and governance. The states have no power to interfere with a sovereign dependent upon the United States, and thus the federal government must have this ability, for there are only two applicable sovereignties within the boundaries of the United States. 118 U.S. at 380-82.

The direct challenge to tribal sovereignty was avoided by using the guardian-ward relationship between the federal government and the Tribe found in *Cherokee Nation, supra*, yet this Court once again characterized Indian tribes as having a semi-indendent position, not possessed of the full attributes of sovereignty, but with the power of regulating their internal and social relations. 118 U.S. at 381-82. This Court recognized that Indian tribes were too weak to provide their own protection and protection of others among them whom they dwell, and that the states were often the Indians deadliest enemies. Thus, the guardian-ward relationship required federal protection of the powers of tribal governments and of the Indians themselves.

The opinion in *Kagama* presents no discussion of the effects of the Major Crimes Act on the previously exclusive tribal jurisdiction over major crimes found in *Crow Dog*, and does not intimate that tribal jurisdiction over such crimes may have been affected. Without explicit removal of the original sovereign power to punish wrongdoers, it remains. *Worcester v. Georgia, supra*.

The determination of tribal citizenship, remains within the limited sovereignty of the tribe. *In re Mayfield*, 141

U.S. 107 (1891), involved a petition for writ of habeas corpus against confinement as a result of a federal conviction for adultery in the Cherokee Territory. Petitioner was an adopted member of the Cherokee Nation, and was born a non-Indian. This Court held the adoption of Mayfield under the laws and customs of the Cherokee Nation was sufficient to make this a crime in which tribal jurisdiction was exclusive, because only Indians were involved. *See also, Nofire v. United States,* 164 U.S. 667 (1897).

The sovereign power of tribes to determine citizenship and the political rights appurtenant thereto was also upheld as a legitimate means for apportioning federal allotments of land in the *Cherokee Intermarriage Cases,* 203 U.S. 76 (1906). Similarly, the rights of all the members of the Deleware Tribe, who settled in Cherokee Territory, were determined by the Cherokee law under which the Delawares were allowed to settle in the Cherokee lands. *Delaware Indians v. Cherokee Nation,* 193 U.S. 127 (1904) In none of these cases does this Court rely upon a federal grant of any power to determine citizenship by the tribes. Neither do any of these cases involve the use of the limited tribal sovereignty as a shield against the jurisdictional assertions of the states.

Talton v. Mayes, 163 U.S. 376 (1896), bears directly on the question of whether tribal governments derive their limited powers from original sovereignty or from a positive federal grant:

> The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee Nation are federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that

> Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this Court have long since answered the former question in the negative.

163 U.S. at 382-3. *Talton v. Mayes* is often glibly cited for the proposition that the Constitution does not apply to acts of tribal governments. *See, e.g.* Brief of Amicus Curiae Attorney General, State of Washington, at 28. But no analysis of *why* the Constitution does not apply is made. This Court has consistently held that there is a residuum of inherent sovereignty of Indian tribes still capable of supporting tribal governmental actions independent of any grant from the Congress. Other courts and certain academics, *e.g.,* 51 Notre Dame L. 600 (1976), may deny this limited survival of inherent tribal power, but this Court has regularly affirmed its existence, even when ruling that its exercise is curtailed in certain areas. *See, United States v. Kagama, supra.*

This Court approved the power of the tribe to determine inheritance by tribal custom in *Jones v. Meehan,* 175 U.S. 1 (1900). At issue were the rights of the eldest son of a chief, who inherited under Red Lake Chippewa law, and his five siblings, who would receive equal shares under the substantive law urged by the United States. Without finding an express grant to the Chippewa to employ traditional law, this Court upheld the application of tribal law regarding descent and distribution.

Conflict between the tribal government and a non-citizen appeared in *Morris v. Hitchcock,* 194 U.S. 384 (1903), *aff'g* 21 App.D.C. 565 (1903). The Chickasaw Nation had

imposed a tax on all stock animals grazed on the reservation. Morris, a non-Indian, asserted that the Tribe did not have the power to tax him. This Court replied that the right to condition entry into the tribal territory (a sovereign right) supported the imposition of the tax. The Treaties with the Chickasaw sanctioned this power, and the Curtis Act, which otherwise limited Chickasaw tribal government, had as one of its objects the continued exercise of the legislative power of the Tribe, including the power to tax.

The legislative and taxing powers of the Tribe are both residual powers of the independent sovereignty once enjoyed by the Chickasaw Nation. Similarly, *Morris v. Hitchcock* did not involve the use of tribal sovereignty to defeat any assertion of state authority.

The American Policy Review Commission Report

In 1974, the Congress of the United States commissioned a comprehensive study of Indians and Indian tribes in the United States. Public Law 93-580. A select Commission consisting of seven members of Congress and five Indian leaders served on the American Indian Policy Review Commission. The result of that study are now available, and the Court may desire to take note of the *Final Report of the American Indian Policy Review Commission* of May 17, 1977, in particular, Ch. 3 "Doctrines of American Indian Law," and Ch. 5 "Tribal Government." The staff of the American Indian Policy Review Commission also produced several studies, including the *Final Report of the Task Force On Federal, State, and Tribal Jurisdiction To the American Indian Policy Review Commission*, published July, 1976.

CONCLUSION

Amici have demonstrated that there is a consistent line of cases in this Court stretching back over 150 years which recognize and rely upon the sovereign powers still retained by Indian tribes from times prior to the existence of the United States. This coherent body of law affirms that the limited sovereignty exercised by Indian tribes today does not derive from positive grants of governmental power by the United States through treaty or by the Congress through federal statute.

This Court also relies upon the doctrine of tribal sovereignty in a variety of substantive areas, and does not rely upon inherent tribal powers only when tribal actions are thrown into conflict with state assertions of jurisdiction.

The narrow issue presented by the cases is whether or not the Suquamish Indian Tribe possesses the governmental authority to protect all persons within its reservation from minor crimes. Because the power to punish any individual for petit offenses has never been removed from the Suquamish Tribe by the United States, this power still remains.

DATED this 27th day of October, 1977.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977
No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, AND MAKAH INDIAN TRIBE OF THE MAKAH INDIAN RESERVATION, WASHINGTON

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IN THE

Supreme Court of the United States

October Term, 1977
No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, WASHINGTON, AND MAKAH INDIAN TRIBE OF THE MAKAH INDIAN RESERVATION, WASHINGTON

INTEREST OF *AMICI CURIAE*

The *amici* are recognized Indian tribes whose reservations are located within the State of Washington. The Colville Confederated Tribes are subject to total state civil and criminal jurisdiction by reason of Public Law 83-280 (67 Stat. 588). The Makah Indian Tribe is subject to partial state civil and criminal jurisdiction by reason of Public Law 280. Both Tribes have completely equipped and effi-

ciently functioning law and order systems, each predicated upon a federally approved Law and Order Code and enforced by a staff of trained tribal police officers and a tribal court.

Both Tribes attempted unsuccessfully for many years to obtain law and order enforcement from state and county officials before abandoning their efforts altogether and concentrating instead upon strengthening their tribal law and order systems.[1] The failure of state law enforcement on Indian reservations is admitted by the State of Washington.[2]

The radical position of the State of Washington set forth in the Brief for *Amicus Curiae* Attorney General, State of Washington, that Washington's civil and criminal Indian jurisdiction assumed pursuant to Public Law 280 is exclusive of tribal jurisdiction would, if upheld, seriously damage tribal efforts to provide law and order for all citizens and property located within their Reservations. The state's legal position, reflected in Washington Attorney General Opinion, AGO 63-64, No. 68 (November 8, 1963), necessitates this brief on behalf of the two *amici* Indian tribes.

Prior to 1953, the United States and the tribes themselves exercised exclusive jurisdiction over the Indian tribes and Indian reservations in the State of Washington.

1. American Indian Policy Review Commission, *Final Report On Federal, State and Tribal Jurisdiction*, July, 1976, p. 15; Hearings on S. 1 and S. 14 (Reform of the Federal Criminal Laws) Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess., Part VII, pp. 5888-5900 (1973).

2. 'Although the State assumed jurisdiction over major crimes and juvenile delinquency on reservations, counties have not been provided with resources to effectively assume the responsibilities of patrol, apprehension and investigation of offenses commited on reservations . . .' State of Washington, Comprehensive Plan for Law Enforcement and the Administration of Justice, January 1–December 31, 1973, at 109.

In 1953 Congress enacted Public Law 280 to provide for state assumption of Indian jurisdiction. The Act gave California, Minnesota, Nebraska, Oregon and Wisconsin, known as the "mandatory" states, complete civil and criminal Indian jurisdiction. Section 6 of the Act gave an additional eight states, including Washington, known as the "option" states, the power to assume civil and criminal Indian jurisdiction upon removal of state constitutional impediments. Each of those eight states has a constitution disclaimer of Indian jurisdiction required by its enabling act as a condition of statehood. Finally, §7 of the Act gave the remaining 15 or 18 states with Indian populations, also known as "option" states, the power to assume civil and criminal Indian jurisdiction by state legislative action.

In 1957, the Washington legislature enacted Chapter 240, Laws of 1957 (RCW Ch. 37.12) which allowed Indians to request state assumption of civil and criminal Indian jurisdiction through gubernatorial proclamation. In 1963, the Washington legislature amended the assumption statute in Chapter 36, Laws of 1963 (RCW Ch. 37.12) by dividing Indian jurisdiction into two broad categories: (1) jurisdiction assumed with tribal consent, and (2) jurisdiction assumed without tribal consent.

The first category provided for state assumption of total civil and criminal jurisdiction in the reservation of any tribe requesting the gubernatorial proclamation. But as to non-consenting tribes, the state assumed total civil and criminal jurisdiction on fee land, but jurisdiction limited to eight subject matter categories on trust land: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption pro-

ceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads and highways.

In summary, Washington's partial assumption scheme involves multiple partial assumptions: (1) assumption of jurisdiction of fewer than all Indians, tribes and reservations; (2) partial territorial assumption within a single reservation; and (3) partial subject matter assumption within a single reservation. In both the 1957 and 1963 Acts, the legislature assumed civil and criminal Indian jurisdiction in the foregoing complex, partial and checkerboard fashion without amendment of the state constitution to remove the disclaimer provision.

Washington's assumption of Indian jurisdiction is invalid since it violates 25 Stat. 676, §4 (the Washington Enabling Act) and Public Law 83-280 (67 Stat. 588), 18 U.S.C. §1162; 28 U.S.C. §1360. Additionally, it violates art. 26, Section Second of the Washington constitution. Finally, it is unconstitutional in that it violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution.

Because of the extreme legal complexity of Washington's Indian jurisdiction, it is necessary that this Court first consider the legislative history of Public Law 280 and the manner in which Congress proceeded in its enactment before considering the invalidity of Washington's peculiar checkerboard pattern of Indian jurisdiction and its far-reaching constitutional ramifications.

SUMMARY OF ARGUMENT

Public Law 83-280 must be construed upon the basis of Congressional intent. Proper interpretation of Public Law 280, utilizing all of the rules of construction enunciated by this Court, leads to the conclusion that §6 of the Act applies to the state of Washington and requires that the state remove its constitutional disclaimer as a necessary prerequisite to assumption of *any* civil and criminal Indian jurisdiction. Determination of the triggering event to state assumption of Indian jurisdiction pursuant to Public Law 280 is a federal question to be determined by the federal courts. Since Washington failed to eliminate its constitutional disclaimer, its assumption of any civil and criminal Indian jurisdiction violates the Enabling Act, (25 Stat. 676, §4) and Public Law 280.

Public Law 280 did not authorize Washington to assume *partial* civil and criminal Indian jurisdiction, whereas its amendment, the Indian Civil Rights Act of 1968, made such authorization explicit. Under that statute, however, the consent of the Indian people was a necessary prerequisite to the assumption of jurisdiction. Even under Public Law 280 as originally enacted some protection was provided for the Indians since a constitutional amendment was required to remove the impediment to jurisdiction. Washington's assumption of partial civil and criminal Indian jurisdiction violates the federal policy implicit in the Enabling Act and Public Law 280 implementing the trust responsibility of the United States since the state statute assumes Indian jurisdiction without the constitutional amendment by the people of the state. Thus the statute attempts to circumvent a protection for the Indians which Congress carefully included both in the Enabling Act and in Public Law 280.

In addition, Washington's peculiar checkerboard pattern of Indian jurisdiction violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment since the application of state criminal law depends upon the status of the land upon which a crime is committed by an Indian. Similarly, the Washington statute is unconstitutional since it subjects Indians to differing degrees of civil jurisdiction depending upon the status of the land upon which an act occurs. Moreover, the Washington statute is void for vagueness because the eight categories of civil jurisdiction are undefined.

Finally, the state's peculiar checkerboard pattern of Indian jurisdiction violates federal Indian policy by saddling Washington Indians with an unworkable checkerboard jurisdictional scheme.

ARGUMENT

1. The Intent of Congress Governs the Meaning of Public Law 280.

This jurisdiction issue hinges upon a construction of Public Law 280 and its application to states choosing to assume Indian jurisdiction under its provisions. In turn, a proper construction of Public Law 280 hinges upon ascertainment of congressional intent in its enactment.

Indeed, the answers to two simple questions should determine the outcome of the issue. The two questions are: Does §6 or §7 of Public Law 280 apply to the State of Washington? What is the meaning of the applicable section?

The answers to these two simple questions are not so simple. But, fortunately, they are reached by a well-chart-

ed path with adequate signposts established by this Court.

Simply stated, Public Law 280 means what Congress intended it to mean. As held by this Court in *Jones v. Guaranty & Indemnity Company*, 101 U.S. 622, 25 L.Ed. 1030 (1879).

> . . . The intent of the law-maker is the law. *The People v. Utica Insurance Company*, 15 Johns (N.Y.) 357; *United States v. Babbit*, 1 Black. 55.

101 U.S. at 626.

The role of this Court in determining that intent is succinctly stated in *United States v. Cooper Corporation*, 312 U.S. 600, 85 L. Ed. 1071, 61 S. Ct. 742 (1941) at 606.

> . . . Our function ends with the endeavor to ascertain from the words used, construed in light of the relevant material, what was in fact the intent of Congress.

and again in *United States v. American Trucking Association, Inc.*, 310 U.S. 534, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940).

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.

310 U.S. at 542.

In approaching its function of ascertaining Congress' intent in enacting Public Law 280, this Court must be guided by the maxim requiring that a statute be construed so as to give meaning to each section.

> . . . It is a settled rule of construction that 'one part of a statute must be so construed by another that the whole may, if possible, stand; *ut res magis valeat quam pereat;*' 1 Bl.Com. 89; or, as otherwise expressed, that every clause in a statute should have effect, and one portion should not be placed in antagonism to another. *Brooks v. Mobile School Board*, 31 Ala. 227.

United States v. Landram, 118 U.S. 81 at 85, 30 L. Ed. 58 at 60, 6 S. Ct. 954 (1886).

And at the same time this Court must observe the corollary maxim of avoiding redundancies.

> . . . Such a result would be contrary to the well-established principle of statutory construction that, where another interpretation is permissible, courts will not construe a statute to make it redundant, absent a clear legislative purpose to the contrary.

Supreme Investment Corporation v. United States, 468 F.2d 370, 381 (5th Cir. 1972); *Singer v. United States*, 323 U.S. 338, 89 L. Ed. 285, 65 S. Ct. 282 (1945).

Just what is the "relevant material" that this Court must look to in finding congressional intent? Relevant material includes informed congressional discussion, *United States v. CIO*, 335 U.S. 106, 92 L. Ed. 1849, 68 S. Ct. 1349 (1948), reports of legislative committees, *Harrison v. Northern Trust*, 317 U.S. 476, 87 L. Ed. 407, 63 S. Ct. 361 (1943), legal opinions relied upon by bill sponsors and congressional committees, *Helvering v. Griffiths*, 318 U.S. 371, 87 L. Ed. 843, 63 S. Ct. 636 (1943), and memoranda inserted into the Congressional Record, *Galvan v. Press*, 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737 (1954).

As a general rule.

> . . . It is the sponsors that we look to when the meaning of the statutory words is in doubt.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 at 394-5, 95 L. Ed. 1035, 71 S. Ct. 745 at 750 (1951).

2. The Terms of Consent by Congress to State Assumption of Indian Jurisdiction Required Amendment of the Washington Constitution.

Keeping the applicable rules of statutory construction firmly in mind, this Court must now examine the legislative history of Public Law 280. The law was not enacted in a vacuum, but was one of many pieces of legislation considered by the 83rd Congress which strongly supported termination of Indian tribes. An examination of Senate Report No. 699[3] which accompanied H.R. 1063 reveals that in the midst of termination bills and other measures in five distinct areas of legislation, Public Law 280 was narrowly tailored to meet only two legislative purposes, namely, to extend state criminal laws to Indian country and to make provision for state courts to adjudicate civil controversies affecting Indians arising in Indian country.[4]

The original bill, introduced by Congressman Norris Poulson of California, was originally drafted for California alone. But the Department of the Interior recommended that it be recast as a prototype bill allowing all states to assume Indian jurisdiction upon compliance with its provisions. The attempt led head on into a snarl of constitutional complexity. The difficulty lay in Supreme Court decisions and congressional acts in response to those decisions prohibiting state jurisdiction in Indian country.

Beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), this Court had held that until Indian title to Indian country was extinguished, (1) Indian country remained completely separate and apart from states whose laws could not be applied *extraterritorially*

3. U.S. Code Cong. & Ad. News, 1953, 83d Cong. at 2409.
4. *Id.* at 2411.

inside the reservations, and (2) attempts to assert state jurisdiction over Indian country invaded the exclusive power of the United States to regulate Indian commerce. In the Indian Trade & Intercourse Act, 4 Stat. 729, Congress defined "Indian Country" as land to which Indian title had not been extinguished, including Indian lands within states and *outside* states.[5]

In *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667, 673, 674 (1866), this Court affirmed Worcester and in a companion case, *The New York Indians*, 72 U.S. (5 Wall.) 761, 18 L.Ed. 708 (1866), this Court extended the doctrine to the thirteen original states. The significance of *The New York Indians* is that the Supreme Court's prohibition of state jurisdiction on Indian reservations is shown to be *independent* of state enabling acts.

To summarize, in 1888, the date of congressional debate upon the Enabling Act for Washington, Montana, and the Dakotas, state Indian jurisdiction was prohibited (1) by this Court until Indian title was extinguished and (2) by Congress under its exclusive Indian commerce power.

Congressmen drafting and debating the Enabling Act were perfectly aware of both distinct prohibitions, and in explanation of the provision for disclaimer of Indian jurisdiction, the House Committee on Territories reported:

> Your committee desires to call attention to the fact that there are in the Territory of Dakota [and also in Washington] large Indian reservations, *which by the terms of the bill are excluded from the jurisdiction of the proposed state. . .*
>
> . . . In view of the fact these Indian lands are not open to settlement, and are not subject to taxation, and remain within the exclusive control and jurisdiction of

5. H. Rep. No. 474, 23d Cong., 1st Sess. at 1-2, 10 (1834).

> the United States, *the area of Dakota upon which the State government can operate is reduced to 70,000,000 of acres*—a less area than that of the State of Nevada.

(Emphasis added.) H. Rep. No. 1025, 50th Cong., 1st Sess. at 8, 9 (March 13, 1888).

In the earlier bill upon which the Committee on Territories had rendered an adverse report, the characterization of the effect of a disclaimer clause was the same.

> . . . Another reason for opposing a division of Dakota, as provided in the pending bill, is found in the fact that there are in that Territory at this time nine Indian reservations [and some in Washington], *the jurisdiction over which is reserved to the United States, and excluded from the Territory and from the proposed State, so long as the Indian titles exist*. The State can not tax the lands in these reservations, or derive any advantages from them. . .

(Emphasis added.) H. Rep. No. 709, 50th Cong., 1st Sess., at 24, Adverse Report to Accompany H.R. 1679 (Feb. 24, 1888).

As enacted, the Enabling Act provides in §4:

> . . . And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the *people* of said States:
>
> . . .
>
> Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that *until the title thereto shall have been extinguished by the United States*, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . .

(Emphasis added.)

The cornerstone to understanding Congress' intent in the Enabling Act and later in Public Law 280 is recognizing that the "consent of the United States" to assumption of Indian jurisdiction contemplated in the Enabling Act was predicated upon a *previous* extinguishment of Indian title which the General Allotment Act of 1887, 24 Stat. 389, was specifically designed to effect. In *Draper v. United States*, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107 (1896), this Court recognized §6 of the General Allotment Act as contemplating ". . . the gradual extinction of Indian reservations and Indian titles," and further held:

> . . . From these enactments [referring to the Enabling Act and the General Allotment Act] it clearly follows that at the time of the admission of Montana into the Union, and the use in the Enabling Act of the restrictive words here relied upon, *there was a condition of things provided for by the state law of the United States*, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the State to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the State.

(Emphasis added.) 164 U.S. at 246.

But history cannot be foretold. The allotment system was dismantled in the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and successive federal statutes have continued the trust status of tribal and allotted Indian lands. Indian title has not been extinguished.

Another problem, of equal significance, is that the ordinance called for in §4 of the Enabling Act was, by the

terms of the Act, incorporated into the Constitutions of Washington, Montana, and the Dakotas, and similar ones were incorporated into the Constitutions of Arizona, New Mexico, Oklahoma, and Utah. But since the consent of "the people of said States" was a necessary prerequisite to state assumption of Indian jurisdiction under the various enabling acts, and since each state constitution could only be changed through its amendatory procedure, the 93rd Congress was aware that amendments to those eight state constitutions were necessitated by the enabling acts and the state constitutions.

The difficulty which confronted Congress in 1953, then, lay in part in its desire to consent to state assumption of Indian jurisdiction *without* extinguishment of Indian title, and in part in the necessity of amendment of state constitutions for eight of the 26 states under consideration.

The constitutional maze through which Congress had to thread its way required *in the minds of the Congressmen involved* that the United States give an *altered* consent, one not contemplated in the Enabling Act, but one admirably crafted to achieve Congress' aim through provision for amendment of state constitutions and the unusual device of simultaneous but *conditional* amendment of the enabling acts.

Fortunately, the precise constitutional thinking of the Committee on Interior and Insular Affairs of the House of Representatives which shaped Public Law 280 is available to illumine for this Court the step by step evolution of the Act. Reprints of two previously unpublished reports of hearings on H.R. 1063 have been obtained from the Na-

tional Archives and are being filed with the Court with this Brief.[6]

The evolution of §6 and §7 of Public Law 280 can best be ascertained from the informed congressional discussion in the Committee Hearing. Mr. Abbott, counsel to the committee, first stated:

> . . . The bill does not, as acted upon by the committee make provision for eight states which have constitutional organic impediments for accepting state jurisdiction. The enabling act for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and *Washington* provided that exclusive Federal jurisdiction would be retained.
>
> The Indian Bureau in listing states pointed out that those eight states now have organic law impediments in their constitutions or other laws which would not enable them to take on state jurisdiction. . .
>
> . . .
>
> I have handed to Mr. Young a proposed amendment which would provide for the granting of consent to states having organic law impediments. At such time as they remove those impediments by action [sic] the people in the state, they could then take over the exclusive civil and criminal jurisdiction over Indians and Indian matters.
>
> In addition, Mr. Westland's state [Washington], which is one state which has a constitutional impediment, the one section provides for removal by the state of constitutional impediments. The other section would apply to any other of the 15 Indian states, so that they by affirmative legislative action could assume either criminal or civil jurisdiction, or both, at

6. *Hearing on H.R. 1063 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives,* 83rd Cong., 1st Sess. (June 29, 1953); *Hearing on H.R.* 1063 *Before the Committee on Interior and Insular Affairs, House of Representatives,* 83rd Cong., 1st Sess. (July 15, 1953). Copies of the original typewritten hearings were filed by the United States with this Court in *Tonasket v. State of Washington,* No. 71-1031.

> such time as the matter were laid before the legislative bodies.
>
> In short the legislation as acted upon by the committee would apply to only five states. The two additional section amendments would apply *first to the eight states having constitutional or organic law impediments* and would grant consent of the United States for them to remove such impediments and thus acquire jurisdiction.
>
> The other amendment would apply to any other Indian state, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction.

(Emphasis added). Committee Hearing on H.R. 1063, p. 2-3, (Page 23, Printed Copy).

So we see that in order to allow the bill to operate nationwide, the legal analysts who generalized the bill recognized that amendments would have to be made to provide for differing legal problems in two distinct sets of states.

The two amendments which solve the two problems just discussed have sharply contrasting language:

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act,

> to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Public Law 280, 67 Stat. 588 at 590.

Mr. Abbott's bald statement that §6 *and not* §7 governs Washington, makes Congress' intent very clear. But the matter doesn't end there. The conclusion is bolstered in the Senate and House Committee Reports on H.R. 1063 which read in part:

> Your committee has amended the printed bill by adopting substitute language which operates to—
>
> . . .
>
> (2) give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment *by amending or repealing such disclaimer laws.*
>
> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and *Washington.* Effect of the disclaimer of jurisdiction over Indian land within the borders of these States—in the absence of consent being given for future action to assume jurisdiction—*is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure.*

(Emphasis added). (U.S. Code Cong. & Ad. News, 1953, 83rd Cong. at 2412; 99 Cong. Rec. 10782, August 1, 1953).

The matter is placed beyond any reasonable doubt by colloquy on the floor of the Senate:

> Mr. Case . . . It is noted that the bill refers specifically to California, Minnesota, Nebraska, Oregon and Wisconsin. It is my understanding that the bill also contains a couple of paragraphs which make it possible for States which by their compacts with the United States, or, in some cases, their constitutions, ceded jurisdiction with respect to Indian lands to the United States, *to amend their constitutions so as to come under the* provisions of the bill. I have in mind, of course, particularly the situation in South Dakota [and Washington under the identical enabling act]. I understand that the same situation obtains in Montana, North Dakota and possibly Wyoming.
>
> . . .
>
> Mr. Barrett: Mr. President, the Senator from South Dakota is correct.

(Emphasis added). 99 Cong. Rec. 10782 (August 1, 1953).

Congress' intent in Public Law 280 is detailed (1) by the sponsors of the act, (2) in congressional hearings, (3) in Senate and House Reports, and (4) in Senate floor debate. *All agreed unanimously that §6 and not §7 governed Washington.* Nothing further could possibly be asked of Congress.

We now reach the second question facing this Court. What is the meaning of §6 of Public Law 280? Close analysis is necessary.

A. *Conditional Amendment of the Enabling Act*

Section 6 begins:

> Notwithstanding the provisions of any Enabling Act for the admission of a State . . .

and then grants federal consent to amendment of the constitution. The addition of the initial amendatory language is explained by colloquy in the Committee Hearing on H.R. 1063.

Mr. Berry: Mr. Chairman, I would like to ask a question. Would it not be better to word that to say that this 'shall be applicable,' instead of saying 'consent is hereby granted.' Why not say, 'The provisions of the law shall be applicable' to these states wherein they do these things.

Mr. Westland: I believe the law would then be applicable to them, once they had taken this affirmative action.

. . . .

Mr. Dawson: That brings up another question: Whether your wording should refer to the Enabling Act. You say 'We hereby give our consent for them to amend their state constitution.' Their state constitution was based upon the Enabling Act. In other words, they followed that. I wonder whether we should have something in there to say 'Notwithstanding any restrictions in the Enabling Act, consent is hereby given to amend their state constitution.'

Mr. Abbott: (Counsel) I believe that clause 'notwithstanding any provisions of the Enabling Act' for such states might well be included. *It would make clear that Congress was repealing the Enabling Act.*

Mr. Dawson: *To give permission to amend their constitution.*

Mr. Abbott: (Counsel) I think that would help clarify the *intent* of the committee at the present time and of Congress if they favorably acted on the legislation.

(Emphasis added). Committee Hearing on H.R. 1063, p. 8-9, (Page 27, Printed Copy).

When Congress did act favorably on the legislation, its intent to amend the Enabling Act for the *limited* purpose of allowing constitutional amendment became law. But it must be firmly kept in mind that the Enabling Act amendment was only *conditional* and only became operative by virtue of state constitutional amendment. The proviso to §6 underscores this conclusion.

. . . *Provided,* That the provisions of *this Act* shall not become effective . . . *until*

. . . .

(Emphasis added). 67 Stat. 588 at 590.

Bluntly put, since Washington did not amend its constitution, its Enabling Act was not amended by Public Law 280 and it could not validly assume Indian jurisdiction.

B. *Consent to Amendment of State Constitution*

After the initial amendatory language §6 continues:

. . . the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act . . .

67 Stat. 588 at 590.

Thus, §6 gives federal consent to state assumption of Indian jurisdiction and again the proviso conditions that consent upon amendment of the constitution. That this twofold conclusion is Congress' intent is spelled out in the Committee Hearings on H.R. 1063.

Mr. Berry: Does not this make this bill applicable to all states who amend their laws under the constitution, and it greatly increases the authority of the bill.

Mr. Abbott: (Counsel) The intention was to grant it to all states at such time as they were willing to take it. The five states we have named have been consulted with by the Indian Bureau. *At any other time in the future that the state of Washington or South Dakota is able to remove their constitutional impediments, then they could so do it* . . .

Mr. Westland: I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as

> criminal and civil was concerned, but they do have a constitution there that requires this amendment [referring to §6] in order that they can get at it.

(Emphasis added). Committee Hearing on H.R. 1063, p. 7-8, (Page 26, Printed Copy).

Then the Committee began consideration of §7 which provides Indian jurisdiction for any of the other 18 states with Indian populations.

> . . . at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the state to the assumption thereof.

67 Stat. 588 at 590.

The contrast between the language of §6 authorizing "the people of any state to amend . . . their state constitution" and that of §7 providing that "the people of the State shall, by *affirmative legislative action*" points up quite forcefully Congress' plain intent that the triggering event in §6 be a normal constitutional amendment and the triggering event in §7 be a statute enacted by the legislature. The point was driven home once and for all in the Subcommittee Hearing on H.R. 1063 at which Harry A. Sellery, Chief Counsel for the Bureau of Indian Affairs, and William R. Benge, Chief of the Branch of Law and Order of the Bureau of Indian Affairs, presented the final version of the act.

> Mr. Abbott: (Counsel to Committee) Mr. Binge informs me there are 26 states shown there as having Indian populations. You can correct it for the record, Mr. Benge, but I believe several of those states have constitutional problems against jurisdiction.
>
> Mr. Benge: Yes, sir; that is right.
>
> Mr. Abbott: Which would mean that there would be apparently no jurisdiction.

> Mr. Benge: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. *The Organic Act which admitted the state to the union and the state constitution would have to be amended.* The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. *To meet that the State Legislature would* have to amend the constitution.
>
> I take it that a general bill like this would be regarded as authority by Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.
>
> Mr. Aspinall: *The State Legislature would not do it. The people of the state themselves would have to do it.*
>
> Mr. Benge: Yes, sir.

(Emphasis added). Subcommittee Hearing on H.R. 1063, p. 23-24, (Page 17, Printed Copy).

There it is in a nutshell. Nothing could demonstrate more effectively Congress' intent that §6 authorizes Washington to assume Indian jurisdiction not by legislative action but only conditionally upon amendment of the constitution.

One difficulty remains, however. Section 6 of Public Law 280 authorizes amendment of the constitution "or existing statutes . . ." Does that not mean that simple legislative action without constitutional amendment is alternatively authorized by §6 for Washington? Are §6 and §7 interchangeable in some cases?

Such an interpretation will not do. First, it would make §6 and §7 equivalent, and therefore, §7 totally redundant in blatant violation of the maxim of avoiding redundan-

cies. Second, not only is another reasonable interpretation permissible, *United States v. Landram,* 118 U.S. 81, 30 L.Ed. 58, 6 S.Ct. 954 (1886) it is required by clear legislative purpose to the contrary. Finally, and providentially, the very problem occurred to Congressman Wesley A. D'Ewart of Montana during committee deliberations.

> Mr. Westland: This amendment would insert two new sections. First is section 6, which says: 'The consent of the United States is hereby given to the people of any state to amend where necessary their state constitutions or existing statutes, . . .'
>
> Mr. D'Ewart: *I do not think we have to grant permission to a state to amend its own statutes.*
>
> Mr. Abbott: (Counsel) Mr. D'Ewart, I believe *the reason for this is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act [the enabling act] and it may be unnecessary, but by some state courts it may be interpreted as being necessary.*

(Emphasis added). Committee Hearing on H.R. 1063, p. 6-7 (Page 25, Printed Copy).

The grant of permission to amend statutes in §6, then, is an extra measure of consent to states with disclaimers of Indian jurisdictions in their constitutions and in their statutes as well. Such consent to statutory amendment is intended to be *in addition to* constitutional amendment even though possibly "unnecessary," and is decidedly not intended to provide an alternative to constitutional amendment. The unusual states with statutory as well as constitutional disclaimers of Indian jurisdiction are Oklahoma,[7] North Dakota,[8] and South Dakota.[9] The extra measure of

7. Oklahoma Statutes Annotated 68 §15.2 (1945).
8. North Dakota Revised Code 57-0208.
9. South Dakota Compiled Laws §5048-53 (1929).

consent to amend statutes in §6 is limited to those three states, but is no substitute for the mandatory requirement of state constitutional amendment required of Washington.

3. Whether Washington Has Validly Assumed Indian Jurisdiction Is a Federal Question.

Determination of what action is required under §6 to trigger conditional amendment of the Enabling Act and effect Congress' consent to state assumption of Indian jurisdiction is a federal question deriving from the federal Constitution. *Leser v. Garnett,* 258 U.S. 130, 66 L.Ed. 505, 42 S.Ct. 217 (1922). Only federal interpretation of the effectiveness of the triggering event is controlling. *United States v. Brown,* 334 F.Supp. 536 (D. Nebr. 1971); *Omaha Tribe of Nebraska v. Village of Walthill,* 334 F.Supp. 823 (D. Nebr. 1971); *Leser v. Garnett, supra.* In this case, Congress' own interpretation that the triggering event be a state constitutional amendment is not only decisive, but guaranteed by the final provisio in §6.

In *Tonasket v. State,* 84 Wn.2d 164, 525 P.2d 744 (1974) (*Tonasket II*), the Washington Supreme Court predicated its upholding of Washington's assumption of Indian jurisdiction upon construction that the phrase "where necessary" in §6 transmutes the problem of sufficiency of the triggering event from a federal matter into a state matter. Once safely on its own ground, the Washington Court then construed both §4 of the Enabling Act and Const. art. 26, Section Second, as requiring only the consent of the people of the state "speaking through the legislature" to eliminate the constitutional disclaimer.

It is precisely at this point that *Tonasket II* went off the rails. The necessity of state constitutional amendment does

not derive in the first instance, from §6 of Public Law 280, but rather from §4, of the Enabling Act. But §4, and consequently the Compact in Section Second of the state constitution, require that the disclaimer of Indian jurisdiction be irrevocable without consent of the United States and "the people" of the state.

The Compact was adopted by the people of the state. Since the constitution was approved by the people pursuant to federal mandate, the Compact is between the federal government and the people and cannot be altered except upon consent of the people *speaking for themselves.* The state court begged the question by skipping lightly over the crucial distinction between the people speaking for themselves, and representational speech where the few are authorized to bind the many.

But this distinction was not missed by Congress. Indeed, Congress adverted to it in §4 of the Enabling Act when it stated "the delegates to the conventions . . . *shall declare, on behalf of the people* of said proposed States that they adopted the Constitution of the United States. . . ." This analysis alone destroys the foundation of *Tonasket II* and with it Washington's attempt to assume Indian jurisdiction. It convinced the Honorable Justices Utter and Stafford of the Washington Court who dissented in *Tonasket II* and would have held that Washington's assumption of Indian jurisdiction violates the Enabling Act, Const. art. 26, Section Second and §6 of Public Law 280. Determination of the triggering event remains a federal question and that federal question transcends any state limitations sought to be imposed upon it. *Leser v. Garnett, supra,* at 137.

In *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 655

(9th Cir. 1966) (*Quinault II*) the Ninth Circuit Court held that the underlying concern of Congress in enacting Public Law 280 was not that Washington's disclaimer be removed in any particular way, but that it be removed in some way which would be valid and binding under state law before federal jurisdiction be relinquished. Relying on the Washington Court's upholding the validity of Washington's removal of its constitutional disclaimer as valid under state law, the Ninth Circuit Court upheld Washington's assumption of Indian jurisdiction as valid.

But at the time of *Quinault II* in 1966, the Ninth Circuit did not have the benefit of 7 major aids necessary to its proper construction of Public Law 280, namely (1) the Subcommittee and Committee Hearings on H.R. 1063; (2) the statement of Representative Wayne Aspinall on the floor of the House of Representatives during Congressional debates on the Indian Civil Rights Act of 1968, 114 Cong. Rec. 9615 (1968); (3) the Indian Civil Rights Act of 1968; (4) *Kennerly v. District Court of the Ninth Judicial District of Montana,* 400 U.S. 423, 27 L.Ed. 2d 507, 91 S.Ct. 480 (1971); (5) *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973); (6) *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976); (7) *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 48 L. Ed. 2d 710 (1976). Had the Ninth Circuit had these materials available, it is unlikely that it would have decided *Quinault II* as it did.

In any event, compacts are peculiarly within the domain of federal law, to be determined by this Court, even in situations in which a state supreme court attempts to con-

strue a state constitution. In *Dyer v. Sims*, 341 U.S. 22, 95 L.Ed. 713, 71 S.Ct. 557 (1951), this Court held:

> The Supreme Court of Appeals of the State of West Virginia is, *for exclusively State purposes*, the ultimate tribunal in construing the meaning of her Constitution. Two prior decisions of this Court make clear, however, that we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States.

(Emphasis added.) 341 U.S. at 28.

States who are parties to a compact, by accepting it and acting under it, assume the conditions that Congress under the Constitution attached. *Petty v. Tennessee-Missouri Bridge Co.*, 359 U.S. 275, 281, 3 L.Ed. 2d 804, 79 S.Ct. 785 (1959). The rationale is that a national and not merely a regional interest is involved and therefore Congress must exercise national supervision through its power to grant or withhold consent or to grant it under appropriate conditions.[10]

The same rationale applies to the Compact between the federal government and the people of Washington. This is especially so since Indian jurisdiction is federal in nature, having been delegated to Congress in art. I, §8, cl. 3 of the Constitution. Whenever a state leaves the sphere that is exclusively its own and enters into activities subject to Congressional regulation—such as Indian jurisdiction—it subjects itself to that Congressional regulation as fully as if it were a private person or corporation. *Parden v. Terminal Railway*, 377 U.S. 184, 196, 12 L.Ed. 2d 233, 84 S.Ct. 1207, *reh. denied*, 377 U.S. 1010, 12 L.Ed. 2d 1057, 84 S.Ct. 1903 (1964).

10. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 694-695.

4. States Are Not Free to Assume Indian Jurisdiction Except Upon Strict Compliance With Public Law 280.

In *Kennerly, supra,* this Court rejected an attempt by Montana to assume jurisdiction over the Blackfeet Indian Reservation and its members *without enacting a statute or amending its constitution.* This Court noted that

> . . . Section 7 of that statute [Public Law 83-280] conditioned the assumption of state jurisdiction on 'affirmative legislative action' by the State. . .

400 U.S. at 427, and added

> . . . *Nor was the requirement of affirmative legislative action an idle* choice of words. . .
>
> . . . Our conclusion as to the intended governing force of §7 of the 1953 Act is reinforced by the *comprehensive and detailed congressional scrutiny* manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country.

400 U.S. at 427. (Emphasis added.)

In point of fact, in *Kennerly, supra,*[11] this Court mistakenly assumed that §7 applied to Montana. But this Court had no need to involve itself with the fine distinctions between §6 and §7 since Montana had not acted at all, neither amending its constitution nor enacting a statute. Clearly Montana failed to satisfy either section and this Court needed to look no further. Nor did this Court have the benefit of the then newly-discovered Subcommittee

11. It appears that this Court's mistaken reference to §7 in *Kennerly* stems from the fact that counsel for all parties mistakenly advised this Court that §7 was the pertinent section. Had the decision required a comparison between §6 and §7, the mistake would, no doubt, have been uncovered. The Ninth Circuit Court noted in *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington*, 550 F.2d 443 (9th Cir., 1977) [hereinafter referred to as "Yakima case (1st opinion)"] p. 445, n. 3, that Washington governed by §6.

and Committee Hearings on H.R. 1063.

Besides, this Court has since corrected its misapprehension. In *McClanahan, supra,* the Supreme Court struck down Arizona's attempt to assume taxing jurisdiction over Indians residing on the Navajo Reservation without complying with Congress' detailed regulations for assuming Indian jurisdiction. Arizona has a disclaimer of Indian jurisdiction identical to Washington's, Arizona const. art. 20, but has never acted under §6 or §7 of Public Law 83-280. This Court held:

> . . . the Act expressly provides that the State must act 'with the consent of the tribe occupying the particular Indian country,' 25 U.S.C. §1322(a), . . . *and* must 'appropriately [amend its] constitution or statutes.' 25 U.S.C. §1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. *But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See Kennerly v. District Court,* 400 U.S. 423, 27 L.Ed. 2d 507, 91 S.Ct. 480 (1971).

(Emphasis added. Footnotes omitted.) 411 U.S. at 177.

It is significant that this Court points to §1324, a reenactment of §6 of Public Law 280, as a "statutory imperative" in striking down Arizona's Indian jurisdiction. 411 U.S. at 179.

Finally, the Washington Court's distinction in *Tonasket II* between "proprietary" and "governmental" state jurisdiction on Indian reservations is altogether specious. In *Maryland v. Wirtz,* 392 U.S. 183, 20 L.Ed. 2d 1020, 88 S.Ct. 2017 (1968), this Court stated:

> In the first place, it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character. As long ago as *Sanitary District of Chicago v. United States* . . . the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce.

392 U.S. at 195.

And the state court decision in *McClanahan,* in which the Arizona Court of Appeals relied on the same specious notion, was unanimously reversed by this Court.

5. Washington's Assumption of Partial Indian Jurisdiction Violates Public Law 280.

Apart from the fact that Washington's assumption of *any* Indian jurisdiction violates the Enabling Act, art. 26, § Second of the Washington Constitution and Public Law 280, it is also invalid for a completely different reason: it is partial and not total as required by Public Law 280.[12]

Public Law 280 was an all or nothing statute. In it Congress required the five[13] mandatory states to assume complete civil and criminal Indian jurisdiction and made no provision for option states such as Washington to assume anything less. The legislative history of Public Law 280 supplies no support for the conclusion that Congress intended Washington or any other state to experiment with

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12. The Ninth Circuit Court rejected this argument in the *Yakima* case (1st Opinion), *supra.* But see dissent at p. 449.

13. Alaska was added as a sixth mandatory state in 1958. Public Law 85-615, 72 Stat. 545.

partial jurisdiction.[14] If an analysis of the text and legislative history of Public Law 280 were not convincing of this point in themselves, it certainly becomes clear when the Act is considered in light of its amendment, the Indian Civil Rights Act of 1968, Public Law 90-284 (25 U.S.C. §1301-1302 and §§1321-1326).

In the new Act, future state assumption of Indian jurisdiction was provided through 25 U.S.C. §§1321 and 1322, the counterparts to the original cessions of Indian jurisdiction, 18 U.S.C. §1162 and 28 U.S.C. §1360. But the two new sections contain a striking change, best seen when they are compared with their counterparts:

THE OLD	THE NEW
18 U.S.C. §1162:	25 U.S.C. §1321:
"Each of States listed in the following table shall have jurisdiction over offenses . . . to the same extent that such State has jurisdiction . . . elsewhere within the State."	"The consent of the United States is hereby given to any State not having jurisdiction . . . to assume . . . such measure of jurisdiction over *any or all of such offenses* committed within such *Indian country or any part thereof* . . ."

14. Goldberg, "P.L. 280: The Limits of State Jurisdiction Over Reservation Lands", 222 U.C.L.A. L. Rev. 535 (1975) at 554-5. *See also Yakima* case (1st Opinion), *supra*.

THE OLD	THE NEW
28 U.S.C. §1360:	25 U.S.C. §1322:
"Each of the States listed in the following table shall have jurisdiction over . . . civil causes of action . . . to the same extent that such state has jurisdiction over other civil causes of action . . ."	"The consent of the United States is hereby given to any state not having jurisdiction over civil causes of action . . . to assume . . . such measure of jurisdiction over *any or all such civil causes of action* arising within such Indian country or any part thereof . . ." (Emphasis added).

Added to these textual changes is the explanatory statement of Representative Aspinall, who had been on the Indian Affairs Subcommittee of the House Committee on Interior and Insular Affairs at the time Public Law 280 was enacted, and who was Chairman of the Committee in 1968, that the 1968 Act:

> would substantially amend (Public Law 280) . . . by permitting states to assume partial jurisdiction over an Indian reservation.

114 Cong. Rec. 9615 (1968).

The Congressional policy underlying Public Law 280 and the fact that Congress felt it necessary in 1968 to provide explicit authority to state assumption of both *partial* subject matter Indian jurisdiction, and *partial* territorial Indian jurisdiction leads ineluctably to the conclusion that Public Law 280 itself did *not* authorize any partial Indian jurisdiction. Washington's assumption of Indian jurisdiction must fall as in violation of Public Law 280.

6. Washington's Assumption of Partial Indian Jurisdiction Within a Single Reservation Violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

It is now necessary for this Court to narrow its view and consider the *specific* legal ramifications of Washington's peculiar checkerboard pattern of Indian jurisdiction. Keeping in mind the state's claim of *exclusive* partial civil and criminal Indian jurisdiction within a single reservation, this Court should consider a specific instance: If a Makah Indian were to murder another Indian on *trust* land inside the Makah Indian Reservation in the course of the felony of rape, he would be prosecuted in federal court pursuant to 18 U.S.C. §1153, the Major Crimes Act, because the state has not assumed jurisdiction. Murder under that section is defined in 18 U.S.C. §1111 which provides for the imposition of the death penalty unless the jury lessens it to life imprisonment. But if a Makah Indian were to murder another Indian on *non-trust* land inside the Makah Indian Reservation in the course of the felony of rape, he would be prosecuted in state court pursuant to RCW 9A.-32.030 and punished pursuant to RCW 9A.32.040 which *limits* the punishment to life imprisonment. In short, the difference is a matter of life and death.

The sole basis for the disparate treatment of the two Indian defendants in the foregoing example is the status of the land on which the crime is committed. Is such discrimination between Makah Indians who commit identical crimes inside the Makah Reservation constitutional? Does subjecting only the Indian who commits murder on *trust* land to a possible death penalty serve some justifiable state governmental objective? Obviously not, for on ten

reservations in Washington state law is applicable on *both* trust and non-trust lands. And within a single reservation such as the Makah Indian Reservation, no rational reason even suggests itself in justification for the discrimination.

Consider a second invidiously discriminatory element inherent in the foregoing example: The federal Indian defendant might raise the insanity defense which, in federal court, is the "substantial capacity test", a variation of the Durham Rule. But the state Indian defendant who raised the insanity defense is faced with RCW 9A.12.010, which prescribes a variation of the M'Naughton Rule. To prove his defense the federal Indian defendant need *only* prove mental disease which prevents him from controlling his conduct even though he knows the difference between right and wrong; but the state Indian defendant must prove either that he was unable to perceive the nature and quality of the act or unable to tell the difference between right and wrong. The federal rule is widely conceded as greatly more advantageous than the state rule. LeFave and Scott, *Criminal Law*, p. 275. No possible rational reason exists why two Indians who commit identical crimes deserve different burdens of proof in the urging of the insanity defense.

In *Confederated Bands and Tribes of the Yakima Nation v. State of Washington*, 552 F.2d 1332 (9th Cir., 1977), [hereinafter referred to as the "Yakima case (2nd Opinion)"], the Ninth Circuit Court struck down Washington's assumption of partial Indian jurisdiction as in violation of the equal protection provision of the Fourteenth Amendment. Addressing itself only to the classification based on the status of title to the land upon which an al-

leged criminal offense occurs, the Ninth Circuit Court stated:

> We can detect no rational connection between the stated purpose and the distinction based on land title within the reservation. The state's interest in enforcing criminal law is no less 'fundamental' or 'overriding' on non-fee lands than on fee lands. An overriding concern with and responsibility for public order necessarily embrace both, once the state undertakes to assume any jurisdiction over either. No showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement. Moreover, no relationship has been suggested or shown between the interest and the ability of the state or provide law enforcement and the fee—non-fee status of the land within the reservation. This checkerboard jurisdictional structure based on a s[illegible]tion by land title is the 'very kind of arbitrary le[illegible]ive choice forbidden by the Equal Protection Clause . . .' (*Reed v. Reed* (1971) 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225). Accordingly, the partial territorial assumption of criminal jurisdiction under RCW §37.12.010 is a denial of equal protection.

552 F.2d at 1334-1335.

7. Washington's Assumption of Partial Indian Jurisdiction Unconstitutionally Subjects Indians to Differing Degrees of Civil Jurisdiction and Is Void for Vagueness.

With respect to Washington's Indian civil jurisdiction, the same unconstitutional discrimination occurs. If a Makah Indian were to commit a tort against a non-Indian on non-trust land inside the Makah Indian Reservation, he would be sued in state court and, if he were found to have committed the tort, subject to the state's procedures for enforcing judgments. But since the state has not assumed jurisdiction over trust land inside the Makah Indian Reservation, a Makah Indian committing a tort on trust land there cannot be subjected to suit in state court. Unless the tribe has set up a tribal court with civil jurisdiction he will, as a practical matter, be immune from liabililty for his tort. RCW Ch. 37.12 sanctions this disparate treatment based solely on the status of the title to the land where the tort occurs, a consideration bearing no reasonable relation to any legitimate state governmental purpose.

Accordingly, Washington's assumption of partial Indian *civil* jurisdiction is as invidiously discriminatory as its partial Indian criminal jurisdiction and thus violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Another feature of what Judge Hufstedler refers to in the *Yakima* case (1st Opinion), *supra*, as Washington's "truly unique checkerboarding" is that the eight categories of civil jurisdiction are so vague as to what civil and criminal matters fall within their ambit that the statute does not meet constitutional standards of definiteness. *Lanzetta v. New Jersey*, 306 U.S. 451 (1938); *Connally v. General Construction Co.*, 269 U.S. 385 (1925).

In the recent case of *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) this Court enunciated the void for vagueness rule:

> Living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.'

The Court went on to say that a statute must give a person of ordinary intelligence fair notice as to what conduct

is prohibited and be sufficiently specific to avoid arbitrary and erratic arrests and convictions.

Nor does RCW 37.12.010 meet the constitutional standards of definiteness through incorporation by reference. Even if these eight items were adequately referenced, they would still fail. *See National Association of Letter Carriers v. U.S. Civil Service Commission*, 341 F.Supp. 370 (U.S.D.C. Dist. Col. 1972), *judgment affirmed*, 409 U.S. 808, 93 S.Ct. 67, 34 L.Ed.2d 62 where this Court held that a Hatch Act prohibition was unconstitutionally vague and overly broad because it incorporated by reference over 3,000 rulings made by the Civil Service Commission between 1886 and 1940. Those 3,000 rulings would be a mere molehill compared to the mountain of statutes, cases, rulings, etc. that the incorporation by reference in this matter would provide.

Consider, for example, the meaning of the phrase "domestic relations" in RCW 37.12.010. At first glance, one might think that "domestic relations" would include all of RCW Title 26— Domestic Relations, including Washington community property law. However, a glance at *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 440 P.2d 442 (1968), reveals the confusion concerning the applicability of community property law on Indian reservations. The lack of definition of any of the eight subject matters or areas of Washington's scheme of partial jurisdiction means that no Indian on any Washington State reservation subject to partial state jurisdiction can possibly be informed as to what the state commands or forbids. Incidentally, this aspect of Washington's checkerboard Indian jurisdiction illumines the reason why an impractical pattern of checkerboard jurisdiction is discredited by

both Congress and this Court. See *Moe, supra,* at 110.

The Ninth Circuit Court in the *Yakima* case (1st Opinion), *supra,* at 448, n. 12 recognized that to determine which of Washington's eight subject matter areas is wholly civil or wholly criminal and to divide up the categories that are part civil and part criminal, would be a very difficult undertaking. Washington Indian citizens cannot constitutionally be required to guess.

8. Washington's Assumption of Indian Jurisdiction Violates the Federal Policy Implicit in the Enabling Act and Public Law 280 Implementing the Trust Responsibility of the United States.

Federal jurisdiction over crimes committed by or against Indians within reservations was upheld by this Court in *United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109 (1886). In *Kagama*, this Court held:

> These Indians are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feelings, the people of the States where they are found are often their deadliest enemies. *From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, arises the duty of protection, and with it the power.* This has always been recognized by the Executive and by the Congress, and by this court, whenever the question has arisen.
>
> • • • •
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom

> they dwell. *It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes.*

(Emphasis added). 30 L.Ed. at 231.

The "duty of protection" referred to by this Court in *Kagama* is the trust responsibility of the United States toward Indian tribes and their enrolled members. Exercise of that trust responsibility is of crucial importance for the very reason that the people of the states in which Indians are found are still often their deadliest enemies.

Thus it is quite natural that three years after the *Kagama* decision Congress acted in accordance with its trust responsibility by requiring in the Enabling Act the Compact by which Washington disclaimed any Indian jurisdiction until (1) Indian title was extinguished, and (2) Congress consented to state Indian jurisdiction. And, again, it was to be expected that Congress would exercise its trust responsibility in 1953 in the enactment of Public Law 280. As stated in *Santa Rosa v. Kings County,* 532 F.2d 655 (1975) *cert. denied* Jan. 10, 1977, ... U.S. .....:

> The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian—a status accompanied by fiduciary obligations. *See Seminole Nations v. United States,* 316 U.S. 286, 297 (1942); *United States v. Kagama,* 118 U.S. 375 (1886); *Beecher v. Wetherly,* 95 U.S. 517, 525 (1877); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 12 (1831). While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, *attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.* See *Squire v. Capoeman,* 351 U.S. 1, 7-8 (1956).

(Emphasis added. Footnotes omitted). 532 F.2d 655, 660 (1975).

To understand the exact manner in which Congress exercised its trust responsibility "in the manner most consistent with the nation's trust obligations" in the enactment of Public Law 280, it is necessary to examine the legislative history of the Act. Senate Report No. 699[15] contains a letter from Orme Lewis, Assistant Secretary of the Interior, to Honorable A. L. Miller, Chairman, Committtee on Interior and Insular Affairs of the House of Representatives, dated July 7, 1953. In his letter, Mr. Lewis points out that the Bureau of Indian Affairs had consulted extensively "with state and local authorities and with the Indian groups" in the five mandatory states and that in each the "State and local authorities indicated their agreeableness to the proposed transfer of jurisdiction."

Elsewhere in Senate Report 699, the Committee recognized the great trust responsibility of the federal government toward Indians by stating that the attitude of the various states and Indian groups within states to be given Indian jurisdiction in the future "should be heavily weighed before effecting transfer."[16] It was precisely to protect Indians from unwanted transfers of jurisdiction to states whose non-Indian citizens who did not wish to

15. Senate Report No. 699, U.S. Code Cong. & Ad. News, 1953, 83rd Cong. at 2411-2412; 83rd Cong., 1st Sess., 99 Cong. Rec. 10782-10783 (1953).

16. *Id.*, at 2412.

fulfill their responsibility under such jurisdiction that Congress required in §6 of Public Law 280 for the simultaneous amendment of the Enabling Act and the Washington constitution. As demonstrated by the colloquy in the *Subcommittee Hearing, supra,* at p. 9, Congress understood perfectly well that the people of the State of Washington would have to amend the Washington constitution *prerequisite* to Washington's assumption of Indian jurisdiction.

As this Court said in *Kennerly*:

> . . . Nor was the requirement of affirmative legislative action an idle choice of words; the legislative history of the 1953 statute shows that the requirement was intended to assure that *state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities.*

(Emphasis added). 400 U.S. at 427.

But since the Washington legislature assumed Indian jurisdiction *without* amendment of the constitution, the people of the State of Washington never manifested by the political action of popular vote their willingness and ability to discharge their new responsibility. And history subsequent to Washington's assumption of Indian jurisdiction demonstrates that the people of the State of Washington are in fact unwilling and unable to discharge the responsibility of Indian jurisdiction. The failure of Washington's Indian jurisdiction *without consent of the people of the state* is beyond dispute. So appallingly unsuccessful and unequal has state jurisdiction been that three Washington tribes have attempted to have it declared invalid.[17] The

17. *Makah Indian Tribe v. State,* 76 Wn.2d 485, 457 P.2d 590

Quinault and Suquamish Indian Tribes have petitioned for retrocession of jurisdiction and partial retrocession has been accomplished.[18]

Washington Indian tribes have repeatedly but vainly sougth retrocession from the legislature. In the course of those attempts, the tribes documented the fact that state jurisdiction is one-edged sword which cuts in the direction of prosecution of Indian offenders but does not cut in the direction of protection of Indians and Indian property on reservations. Washington tribes have been frankly advised by officials of county sheriff's offices that the counties lack sufficient personnel, vehicles, equipment and funds for providing law enforcement on the reservations.

The failure of Washington's Indian jurisdiction is not unique. Hearings held by Senator Ervin's Committee on Constitutional Rights between 1961 and 1968[19] demon-

(1969) *appeal dismissed,* 397 U.S. 316, 25 L.Ed.2d 335, 90 S.Ct. 1115 (1970); *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 648 (9th Cir. 1966) *cert. denied,* 387 U.S. 907, 18 L.Ed.2d 626, 87 S.Ct. 1684 (1967); *Confederated Bands and Tribes of Yakima Nation v. State,* 550 F.2d 443 (9th Cir., 1977) [1st Opinion]; 552 F.2d 1332 (9th Cir., 1977) [2nd Opinion]. In the 2nd Opinion the Ninth Circuit Court invalidated Washington's partial assumption of Indian jurisdiction as in violation of the Equal Protection Clause of the constitution.

18. 34 Fed. Reg. 14288 (Sept. 11, 1969) [Quinault]; 37 Fed. Reg. 7353 (April 5, 1972) [Suquamish]

19. *Hearings on Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., Part 1 (1961), 87th Cong., 1st Sess., Part 2 (1961), 87th Cong., 2d Sess., Part 3 (1962), 88th Cong., 1st Sess., Part 4 (1963); *Hearings on S.J. Res. 40 to Protect the Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965); *Hearings on Rights of Members of Indian Tribes Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 90th Cong., 2d Sess. (1968); *Hearings on Title II of the Civil Rights Act of 1968, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 91st Cong., 1st Sess. (1969).

strated the failure of state Indian jurisdiction nationally and led to the Indian Civil Rights Act of 1968 and its retrocession provisions. The report[20] of the Montana-North Dakota-South Dakota Joint Advisory Committee to the United States Commission on Civil Rights of August 1974, documents an identical failure of state Indian jurisdiction in those three states.

More recently, as a result of 28 days of hearings at which 250 witnesses testified and 4,500 pages of testimony were taken from tribal, state and local government officials, Task Force IV of the American Indian Policy Review Commission documented the massive failure of Indian jurisdiction in Washington in its "Report on Federal, State and Tribal Jurisdiction."

9. Washington's Assumption of Partial Indian Jurisdiction Violates Federal Policy by Creating a Checkerboard Pattern of Jurisdiction on Washington Indian Reservations.

In addition to violating the Congressional policy in the Enabling Act and adhered to in Public Law 280, Washington's Indian jurisdiction violates another federal Indian policy, the policy of Congress not to saddle Indians with an unworkable checkerboard jurisdictional scheme.

In *Moe, supra,* this Court addressed the argument of the State of Montana and §6 of the General Allotment Act of 1887, 24 Stat. 388, *positively* provided for checkerboard jurisdiction respecting allottees whose allotments had been conveyed by patent in fee. As this Court noted:

> A similar claim was made by the State in *Seymour v. Superintendent,* 368 U.S. 351 (1962), to which we responded:
>
> > '[the] argument rests upon the fact that where the existence or non-existence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State of Federal Government.'
> >
> > Id., at 358.
>
> We concluded that '[s]uch an impractical pattern of checkerboard jurisdiction,' *Id.*, was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also *United States v. Mazurie,* 419 U.S. 544, 544-555 (1975).
>
> The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era:
>
> > 'Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging the Indians to adopt white ways. See §6 of the General Allotment Act, 24 Stat. 390; [citation omitted]. The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U.S.C. §461 *et seq.*' *Mattz v. Arnett,* 412 U.S. 481, 496 (1973) (Part of footnote 18 incorporated into text).
>
> The State has referred us to no decisional authority—and we know of none—giving the meaning for which it contends to §6 of the General Allotment Act in the

20. Montana-North Dakota-South Dakota Joint Advisory Committee to the United States Commission on Civil Rights, Indian Civil Rights Issues in Montana, North Dakota, and South Dakota (Aug. 1974).

> face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands—statutes discussed, for example, in *McClanahan*, 411 U.S. at 173-179. See also *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971). *Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.*

(Emphasis added). 45 L.Ed. 2d 96, at 109-110. Included in the "more modern legislation" referred to by this Court is Public Law 280.

Amici Colville Confederated Tribes and Makah Indian Tribe respectfully request this Court to hold that all of Washington's statutes which attempt to assume civil and criminal Indian jurisdiction pursuant to Public Law 280 are invalid, and to affirm the Ninth Circuit decision.

DATED this 25th day of October, 1977.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

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BRIEF OF AMICUS CURIAE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

INTEREST OF AMICUS CURIAE

The amicus curiae National American Indian Court Judges Association is a voluntary association of judges of Indian courts founded in 1968. Its membership and Board of Directors consist of Indian court judges. Its objective is "to provide for the upgrading of the Indian Court System through research, professional advancement and continuing education," and "to maintain and improve the integrity and capability of the American

Indian Court System in providing equal protection to all persons appearing before an Indian Court."

The amicus has a substantial interest in the outcome of this litigation. The resolution of the question of the extent of Indian court jurisdiction over non-Indian offenders committing offenses on Indian reservations will fundamentally affect Indian court operations. The purpose of this brief is to provide the court important information about the existence, nature, goals, training and competence of Indian judicial systems, which will demonstrate their capability to handle a wide variety of cases involving both Indian and non-Indian offenders. The legal arguments are fully addressed in other briefs.

This brief is filed pursuant to stipulation consenting to such action, signed by attorneys for all parties and filed with the Clerk of Court in September 1977.

SUMMARY OF ARGUMENT

Amicus curiae National American Indian Court Judges Association urges the Court to affirm the

decision of the federal district court and the court of appeals in Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), and hold that Indian courts have jurisdiction over a non-Indian who commits an offense against the Tribal Criminal Code while on the reservation. Amicus further urges the court to affirm the district court decision in Belgarde v. Morton, No. C 74-683S (W.D. Wash. 1975), that Indian courts have concurrent jurisdiction with state courts, where the state has assumed Public Law 280 jurisdiction, over offenses committed by either Indians or non-Indians while on the reservation.

Amicus believes that the existing law, expressed in treaties, statutes, and court decisions, amply supports affirmance of both lower court decisions. Further, the arguments by petitioners and their amici that Indian courts are neither competent nor equipped to dispense justice and that criminal defendants are denied due process of law in such courts are without basis and are amply refuted by the facts. Indian courts

certainly have been plagued by a paucity of resources and difficulties in retaining the services of well-trained personnel--problems which beset virtually all rural courts. However, during the past decade Indian courts have become better staffed, the judges better trained, and the facilities more adequate.

The Indian Civil Rights Act of 1968, 25 USC § 1301-03 (1970), mandated substantive and procedural protections for persons within tribal jurisdiction and both federal and tribal governments have responded by giving high priority to the improvement of Indian courts. Court needs have been addressed with dramatically increased federal funding from the Bureau of Indian Affairs and the Law Enforcement Assistance Administration (LEAA) of the Department of Justice. The LEAA not only has provided many individual tribes with assistance in improving court facilities, but it has been the principal source of funding for an extensive judicial education program under direction of amicus National American Indian Court Judges Association.

ARGUMENT

I. During this Century, Indian Courts Have Matured into Progressive and Fair Ministers of Justice

After the 1887 Allotment Act, the Bureau of Indian Affairs (BIA) created a number of Courts of Indian Offenses which were considered essentially instrumentalities of the federal government. See United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888); but see, Cohen, Handbook of Federal Indian Law, 148-149 (U.N.M. Reprint 1972). The tribes themselves retained the inherent power to administer justice. Op. Sol. Interior, No. M-27781, 55 I.D. 14 (Oct. 25, 1934). But until federal Indian policy shifted away from assimilation to a greater recognition of the powers of self-government, many Indian courts remained Courts of Indian Offenses. Although the judges were Indians, they were hired and fired by the BIA and the Interior Department prescribed the codes under which they operated.

In the years since 1887 many Indian tribes have determined to establish their own legal systems and their own tribal courts. Residual

tribal sovereignty is the source of authority for these courts. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). Their specific powers are defined in tribal constitutions and legal codes, adopted by each Indian tribe. In recent years the trend has been for tribes with Courts of Indian Offenses to convert these courts to tribal courts. Of the 133 Indian courts in the country, only 32 are now Courts of Indian Offenses.[1]

This Court has recognized that the authority of Indian courts is an attribute of tribal self-government which must be protected. It has held that such authority extends over non-Indians insofar as on-reservation transactions with Indians. United States v. Mazurie, 419 U.S. 544 (1975); Williams v. Lee, 358 U.S. 217 (1959).

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[1] Even this figure is inflated by the fact that 19 of these Courts of Indian Offenses recently were established with federal assistance to meet the needs of the small and scattered Indian colonies of Nevada which were the subject of a retrocession of jurisdiction from the state to the federal government under 25 USC § 1323 (1970).

A major resurgence in the Indian court system has occurred simultaneously with the federal policy of Indian self-determination of the 1960's and 1970's.[2] One of the important precipitating events in this renewed commitment to the tribal court system has been the passage of the Indian Civil Rights Act of 1968, 25 USC §§ 1301-03 (1970) (ICRA). Until passage of that act, the concepts contained in the Bill of Rights did not apply to actions of tribal courts or tribal governments. Talton v. Mayes, 163 U.S. 376 (1895). The ICRA required Indian tribal governments to afford persons within their jurisdiction most of the same rights they enjoy under the Bill of Rights relative to the federal government

---

[2] This Court has acknowledged the impact of the current policy on interpretation of laws enacted in an era less hospitable to tribal self-government. Bryan v. Itasca County, 426 U.S. 373, 388-89, n. 14 (1976).

and, via the Fourteenth Amendment, the state governments.[3]

---

[3] The ICRA provides that:

> No Indian tribe in exercising powers of self-government shall--
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> (3) subject any person for the same offense to be twice put in jeopardy;
>
> (4) compel any person in any criminal case to be a witness against himself;
>
> (5) take any private property for a public use without just compensation;
>
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

The first reported case involving the ICRA held that the protections of the act applied to non-Indians as well as Indians. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969). To assure compliance with the ICRA, Congress granted the privilege of the writ of habeas corpus to persons detained by order of a tribe. 25 USC § 1303. In addition, federal courts have taken jurisdiction of suits under 28 USC § 1343(4) to enforce provisions of the act. E.g., Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 (10th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1234 (4th Cir. 1974); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 203 (9th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698, 700 (8th Cir. 1972).

> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> (9) pass any bill of attainder or ex post facto law; or
>
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Federal court review has resulted in the development of a substantial body of case law defining the responsibilities of Indian courts under the ICRA.[4] With virtually all Bill of Rights protections assured by federal court enforcement of a congressional enactment, the fears expressed by petitioners and their amici that the tribal judicial process would treat non-Indians unfairly[5] are ill-founded. Two years ago this Court held

[4] Tom v. Sutton, 533 F.2d 1101 (9th Cir. (1976) (right to counsel); Regan v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969) (right to counsel); Low Dog v. Cheyenne River Sioux Tribal Court, Civ. No. 69-210 (D. S.D. 1969) (right to jury trial); In re Pablo, Civ. No. 72-99 (D. Ariz., July 21, 1972) (rights of indigent defendants); Richards v. Pine Ridge Tribal Court, Civ. No. 70-74W (D. S.D., June 30, 1970) (probation revocation); Big Eagle v. Andera, No. 74-1290 (8th Cir., Jan. 8, 1975) (due process--vagueness of criminal statute); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969) (adequacy of detention facilities); Wounded Knee v. Andera, 416 F. Supp. 1236 (D. S.D. 1976) (due process--need for prosecutor).

[5] E.g., Brief for Petitioners, pp. 17, 18; Brief for Amicus Curiae Kitsap County, pp. 18, 24.

that non-Indians were subject to the authority of tribal governments delegated by Congress. United States v. Mazurie, 419 U.S. 544 (1975). In so doing the Court rejected an argument that non-Indians would not be afforded the rights of due process and equal protection by the tribe, citing the ICRA. Id. at 558, n. 12.

The responsibilities imposed on Indian courts by the ICRA were not limited to assuring that their own procedures met the requirements of the act. Numerous courts have held that, in challenges to actions of tribal governments, there must be an exhaustion of tribal remedies before a federal court will hear the matter. E.g., Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973). Obviously, this increases the caseload burden of Indian courts and increases demands for appellate review within the Indian court system. U.S. Department of Justice,

Report of the Task Force on Indian Matters 55 (Oct. 1975).

Recent data collected by the National American Indian Court Judges Association indicates a marked growth in the caseload of Indian courts.[6] For instance, the Jicarilla Apache Tribe of New Mexico had a caseload of approximately 800 in 1975, 1,100 in 1976 and will have 2,000 in 1977 based on the first 40 weeks. The Yakima Indian Nation in Washington had a caseload of 1,200 in 1975, 1,600 in 1976 and projections based on the first 16 weeks of 1977 indicate a caseload of 2,700 this year. Overall, the number of Indian judges has increased in response to growing caseloads. There are currently 217 Indian court judges.

---

[6] The data in this paragraph were collected by the NAICJA Long Range Planning Study pursuant to a contract with the Bureau of Indian Affairs (No. K51C14201023).

II. The Federal Government Has Demonstrated an Increasingly Strong Commitment to the Indian Judicial Systems

Indian tribes found it difficult to pay the higher costs of courts caused by increasing caseloads and the requirements of the ICRA. Their problems have been exacerbated by the typical situation on Indian reservations of long distances between courts and the people they serve, a lack of trained personnel to staff courts, inadequate physical facilities, limited availability of social services, and meager financial resources. There is a striking similarity between the problems of courts on the reservation and those of neighboring non-Indian courts in rural areas. See National Center for State Courts, Rural Courts: The Effect of Space and Distance on the Administration of Justice (1977).

Congress has responded to the needs of Indian courts in recent years by providing more financial assistance to tribes for the purpose of supporting Indian courts. This has been consistent with the congressional policy of enhancing tribal self-

government. The following table indicates how federal support through the Bureau of Indian Affairs has risen.

Bureau of Indian Affairs Budget for Indian Law Enforcement & Courts

1968	$ 3,000,000
1969	$ 4,100,000
1970	$ 5,100,000
1971	$ 5,900,000
1972	$ 7,300,000
1973	$ 8,300,000
1974	$11,800,000
1975	$ 9,871,000
1976	$27,500,000
1977	$28,681,000

Prior to 1976 the BIA support program for tribal courts was located in the Law Enforcement Division. In 1976 this responsibility was given higher priority and as a result the BIA established a separate Judicial Services Division. In 1976 and 1977, $3 million was earmarked for Indian courts of a total budget of $27,500,000 and $25,681,000. The avowed purpose of this new administrative unit is to assist the Indian courts to attain greater professionalization, and more independence from law enforcement activities.

Since it began in 1973, the Law Enforcement Assistance Administration also has made

substantial contributions to the support of Indian courts.

Law Enforcement Assistance Administration Support of Indian Courts

1973	$344,783
1974	$403,843
1975	$505,560
1976	$626,676
1977	$497,004 (incomplete)

Notwithstanding the phenomenal growth in government support of Indian courts, significant needs persist. In order to identify these needs and to develop a program of support to address them, the Bureau of Indian Affairs has commissioned the National American Indian Court Judges Association to do a Long-Range Planning Study. The study will result in an analytical assessment of the strengths and weaknesses of Indian courts, model standards for Indian judicial systems and a recommended 5-year plan of program support for the BIA. The BIA intends to test the model standards by implementing them with four model courts and to consider the 5-year plan as an objective for congressional funding in the near future.

III. Indian Court Judges Have Organized to Address Common Needs

In 1968 the Indian court judges themselves realized the additional responsibilities placed on them by the ICRA and thus they formed the National American Indian Court Judges Association (NAICJA).[7] Its purpose was and is to enhance the overall competence of Indian court judges, and to establish a national program of continuing judicial education. Those goals have been carried forward aggressively over the past 9 years as reflected by some of its significant accomplishments.

A program of continuing judicial education has been funded by the Law Enforcements Assistance Administration since its beginning, with funding levels increasing from $60,000 in 1969-1970 to $437,656 for 1976-1977. The BIA has also supported judicial training in Family Law/Child Welfare in the amount of $98,600 in 1973, increasing to $126,845 in 1977. Of the 217 Indian

[7] A copy of the "Indian Courts Newsletter" Vol. 6, No. 1 (1977) has been lodged with the clerk of court.

court judges in the nation, some 111 have participated actively in the program during the past year. All Indian court judges are eligible to participate. The LEAA funding pays for the instruction, the reading materials, and compensates the judges for per diem and travel for attending the training sessions.

Training takes place at four regional sites. Sessions are held for 2 or 2-1/2 days each month for 6 or 7 months of the year. In addition, there are usually 2 national training sessions of 3 days each. It is interesting to note by comparison that the 98 non-lawyer state court judges in the State of Washington received some 1-1/2 days of training for the year 1976. The figures available for the training of non-lawyer state court judges from other states are similar, showing that the training available--and utilized -- by the Indian court judges is far more extensive than that available to, or utilized by, the non-lawyer, state court judges.

The instructional program is carefully designed at the national level each year under the

supervision of lawyers and law professors, reviewed by the NAICJA Board of Directors, and evaluated at the end of the year. Curriculum is developed and training coordinated by a team of instructors including: Robert Bennett, attorney, former Commissioner of Indian Affairs; Stephen Boyden, attorney; George Armstrong, Colorado District Court Judge; and Ralph W. Johnson, Professor of Law at the University of Washington School of Law.

Study materials for the Indian judges have included traditional law texts such as McCormick on Evidence and LaFave and Scott, Criminal Law. In 1975-1976 the NAICJA commissioned the preparation of a special casebook for the training, "Cases and Materials for Indian Court Judges," by Johnson and White, published by the NAICJA.[8] This 476-page casebook covers jurisdictional questions, substantive and procedural law of crimes, and ICRA issues. In addition, the

[8] A copy has been lodged with the clerk.

1976-1977 sessions covered a separate set of case materials prepared by attorney K. I. Perkins on Criminal Procedure. Additional material covered family law and child welfare. The Board of the NAICJA has commissioned another casebook for the 1977-1978 series of training sessions, covering criminal procedure and civil rights issues. This volume is being prepared by K. I. Perkins of the Library of Congress.

In September 1977 the NAICJA sponsored a week-long training session at the National College for the State Judiciary in Reno, Nevada. Eighty-seven Indian court judges attended this session. Instruction covered important aspects of jurisdiction, criminal law and procedure, family law and child welfare.[9]

Since the formation of the NAICJA, the training program has brought the Indian courts a long way toward a more effective judicial system. The NAICJA anticipates that the program will continue

[9] A copy of the final report on the Reno session has been lodged with the clerk.

to provide Indian court judges with a solid working knowledge of criminal law and procedure, civil law and procedure, and specific knowledge of the rights protected by the Indian Civil Rights Act.

Concurrent with the development of the judicial training program, the NAICJA has undertaken to assist Indian courts in a variety of other practical ways through the preparation of several documents that are useful to Indian court operation including:[10]

1. Criminal Court Procedures Benchbook (1976). This is a standard judicial benchbook, and is now used widely by the Indian court judges. The benchbook replaced an earlier, more rudimentary "Criminal Court Procedures Manual" of 1971.

2. Model Indian Court Rules of Criminal Procedure (1977). These rules are patterned after the Federal Rules of Criminal Procedure but have

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[10] Copies of each of the publications listed have been lodged with the clerk.

been modified for Indian court use. The rules are now being considered for adoption either formally or informally by many reservation courts.

3. Model Appellate Procedures Code (1977). This code provides a method by which several Indian tribes can combine their appellate court systems; it is now being contemplated as a possible model for adoption by various groups of Indian tribes throughout the country.

The NAICJA also established in 1976 a highly successful "Court Advisory Program" by which regional instructors, all of whom are lawyers, have been made available to different Indian courts on a one-to-one basis, to visit the tribal courts, observe trials in process, and to provide advice on how the courts can improve their effectiveness and procedures.

CONCLUSION

Indian courts have grown from disciplinary instrumentalities of the federal government to sophisticated judicial tribunals exercising inherent tribal powers of self-government in

Indian country. Persons coming before the courts --whether Indian or non-Indian--are assured by federal law of receiving a fair trial consistent with due process and other protections found in the Bill of Rights. Further assurance that justice will be done is found in the dedication of tribes, Indian court judges and the federal government to strengthening Indian courts through better funding, staffing, facilities and training.

Respectfully submitted,

October 29, 1977

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1977

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION AND SUMMARY

A. The Scope of the Tribal Power Being Asserted Over the Petitioners.

The Suquamish Law and Order Code by its terms asserts comprehensive criminal jurisdiction over all persons on the Port Madison Reservation

including approximately 3,000 non-Indian residents.[1] Yet these non-Tribal members are completely disenfranchised by the Tribe. They cannot participate directly or indirectly in making the law to which they are asserted to be subject; they are ineligible to be judges of the Suquamish tribal court; they cannot serve as members of juries in that court.

Quite correctly, the United States compares them to aliens "residing in a foreign country," even though they are United States citizens residing in the United States (U.S. Br. 45)

The situation is "uncomfortable," to say the least (Cf., U.S. Br. 46). Indeed, the Tribe's attempt to subject these non-Indians to a legal system in which they can have no voice is, we submit, unconstitional. For this attempt to treat United States citizens as "aliens" in their own country is completely repugnant to the Fifth and Fifteenth Amendments to the Federal Constitution.

In an apparent effort to ameliorate this "uncomfortable" situation, the Tribe and the United States seem to suggest that the scope of the tribal power they here assert is markedly less than that

[1]The Code includes 71 separately defined crimes. (Ch. III, Art. I, §§1-71; Pet. App. 27a-45a.) The only type of major crime typically found in a state criminal code but omitted from the Tribal Code is homicide. Under Ch. I, Art. III, § 3(a) of the Code, the Tribal Court's jurisdiction extends to all crimes defined by the Tribal Code when committed by any person anywhere on the reservation, with one important exception. Jurisdiction does not extend to "major crimes" which are within the jurisdiction of the federal government pursuant to 18 U.S.C. 1153. (Pet. App. 22a, 23a) Since 18 U.S.C. 1153 applies only to "major crimes" committed by Indians, the application of the Code to non-Indians is actually more comprehensive than its application to Indians. The Code thus removes the partial overlap between the Code and federal law—but only for Indians.

possessed by a general purpose government, such as a state, city or county, and perhaps even less than the power which the Tribe asserts in its Code. The limiting standard which they propose is that of a "sufficient tribal interest." (Tribal Br. 5, 53; U.S. Br. 11, 18, 19)

This standard is so vague that it cannot "precisely fix the boundaries of tribal jurisdiction" (U.S. Br. 10) and accordingly will require "a case by case development," (Tribal Br. 53); nevertheless, they argue that the standard is unquestionably satisfied here. After all, Mr. Oliphant allegedly assaulted a tribal police officer, and Mr. Belgarde allegedly damaged a tribal police car. (U.S. Br. 11)

Such an argument, however, starts at the wrong place. Mr. Oliphant was allegedly engaged in an altercation which involved, so far as the record shows, only non-Indians; and tribal police tried to break it up. Mr. Belgarde was allegedly speeding through the community of Suquamish, on a public road. Tribal officers tried to stop him.

Unless the Tribe may validly assert criminal jurisdiction over such events—allegedly disturbing the peace in the case of Mr. Oliphant and allegedly speeding or reckless driving on a public road in the case of Mr. Belgarde—then the tribal police who became involved must be considered as ordinary civilians. That a tribal police car may have been damaged, and that a tribal police officer was allegedly assaulted, is beside the point.

The validity, then, of the Tribe's claims to criminal power in these cases must stand or fall on the basis of its claim to criminal power over the events which prompted the intervention of the tribal police —the disturbing of the peace and the speeding or reckless driving. The attempts of the Tribe and the United States to make their claims appear very narrow, by focusing on an alleged assault to the tribal officer and the damage to the tribal police car, are essentially a sham.[2]

B. **The Basis for the Assertion of Tribal Criminal Power.**

1. *The Starting Point for the Argument of the Tribe and the United States.*

Understanding the breadth of the Tribe's jurisdictional claims is critical; but understanding the precise source of those claims is even more critical.

The source of tribal power is not any provision of the Treaty of Point Elliott. 12 Stat. 927. Nor is it any federal statute.

The source of the power here claimed is not to be found in any written document at all;[3] rather, it is predicated upon the Tribe's *status*—a status supposedly antedating the Treaty of Point Elliott in

[2]The United States admits as much, when it states that its "solution * * * the *McBratney* exception aside, subjects *everyone* [Indian and non-Indian alike] within the reservation boundaries to the *same laws* and the *same courts for like offenses*." (U.S. Br. 38, emphasis supplied) We agree that this would be exactly the result if the "solution" of the United States and the Tribe is adopted, with but one exception. As mentioned at note 1, p. 2, supra, the Code does not apply to crimes committed by Indians when those crimes are also within the scope of the Major Crimes Act, 18 U.S.C. 1153. In contrast, a non-Indian would be subject to the Tribal Code for those same crimes.

[3]It does not even appear in the tribal constitutions adopted in 1916 and 1965. (Pet. App. 4a-6a)

1855 and still existing in 1977. The status claimed is no less than that of a sovereign nation.

The Tribe--like any other sovereign nation—may regulate the conduct of all persons within its territorial jurisdiction, while confining participation in its government to its own "citizens," *i.e.*, to tribal members. The source of the Tribe's claim thus explains the startling breadth of that claim.

The Tribe and the United States admit that federal statutes and treaty provisions are relevant, but only in determining whether any attributes of this "sovereignty" have been taken away by the federal government. Under their theory, one does not look to statutes or treaty provisions to see if any attributes of sovereignty were somehow conferred or recognized in treaty or statute. One looks to these provisions only to see if those attributes have been expressly surrendered or taken away. Unless so surrendered or taken away, all attributes of sovereignty remain with the Tribe.

This is the essential starting point of the whole argument of the Tribe and the United States. And the argument falls, we submit, precisely at this first step.

2. *Examination of the Starting Point.*

The first problem with this starting point is essentially one of logic. If the legal function of a treaty with an Indian tribe is to withdraw attributes of sovereignty, rather than confer them, it would follow that all those tribes which have never entered

into any treaty at all are in the best legal position of all.[4] For they have surrendered *no* attributes of their inherent sovereignty.[5]

This would be an anomalous result, to say the least.

Moreover, this argument was repudiated more than 150 years ago in *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823). In an opinion by Chief Justice Marshall, this Court denied to a non-treaty tribe a basic attribute of any sovereign nation, the right to own and convey land.

Secondly, this starting point is based on a complete misapplication of Chief Justice Marshall's opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) and amounts to mere legal "boot strapping."

Chief Justice Marshall analyzed the provisions of the various treaties entered into with the Cherokee nation and, on the basis of those treaty provisions, concluded that the United States had thereby recognized the Cherokee nation as having a type of sovereign status. Among those treaty provisions were some which expressly conferred tribal criminal jurisdiction over non-Indians.[6]

[4]Non-treaty tribes are not uncommon in the Pacific Northwest. See *Duwamish et al. Indians v. U.S.*, 79 C. Cls. 530, 597 (1934), *cert. den.* 295 U.S. 755. By reason of the Act of Mar. 3, 1871, Ch. CXX, 16 Stat. 566, these non-treaty tribes are now precluded from becoming treaty tribes.

[5]The Congress, of course, could take those attributes away from the non-treaty tribes by statute.

[6]Art. V of the Treaty of Hopewell, 7 Stat. 18, (1785) provides as follows:

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted [to] the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, *such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please*: * * * (Emphasis supplied)

Article VIII of the Treaty of Holston, 7 Stat. 39 (1791) is essentially the same.

But the Tribe and the United States would read Marshall's opinion as saying that *all* Indian tribes have such jurisdiction, *even in the absence of such express treaty provisions.*

They would read Marshall's opinion as saying that the Cherokee Nation, for example, would have had criminal jurisdiction over non-Indian Americans *even if the provisions in the Cherokee treaties by which this jurisdiction was granted did not exist.*

Chief Justice Marshall's opinion says no such thing; and to suggest that it does is legal nonsense. But that reading of Marshall's opinion is the necessary underpinning for the whole argument of the Tribe and the United States.

Congress, fortunately, has never indulged in such nonsense. In enacting 18 U.S.C. 1152 and its predecessors, Congress recognized that provisions such as those in the Cherokee treaties granted tribal jurisdiction — often exclusive tribal jurisdiction — over non-Indians. The effect of such provisions was preserved through the "treaty exception" in § 1152. But in the absence of such provisions, non-Indians were exclusively subject to federal law (or state law, pursuant either to the *McBratney* exception or P.L. 83-280). Cf., *Ex Parte Mayfield*, 141 U.S. 107

(1891) which explains most clearly the congressional policy embodied in § 1152.

Nor has the Attorney General of the United States or the Interior Department ever indulged in such nonsense—until now. The opinions of these two agencies have consistently held, from 1834,[7] that in the absence of treaty provisions expressly granting such jurisdiction, tribal criminal jurisdiction over non-Indians does not exist.

Thirdly, even if one accepts the reading of *Worcester* urged by the United States and the Tribe, that reading would still be inapplicable to the tribes of the Puget Sound area, such as the Suquamish. To view those tribes as having been sovereign nations is to ignore historical reality.

The reality is this:

> No formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens, acting upon instructions from his superiors and recommendations of his subordinates, *deliberately created political entities* for purposes of delegating responsibilities and negotiating treaties. In creating these entities Governor Stevens named many chiefs and sub-chiefs. [Ex. USA-27a, pp. 14-29; Ex. USA-20, p. 28] *U.S. v. Washington*, 384 F. Supp. 312, 355. (Emphasis supplied)

To the extent, then that the "Tribes" of the Puget Sound area constitute governmental bodies,

[7]Cf., 2 Op. Atty. Gen. 693 (1834).

they are purely and simply the creatures of the federal government. Their creation included appointment by federal agents of chiefs and sub-chiefs, all for the purpose of organizing the Indians to facilitate their removal from their individual villages and onto the reservations, out of the way of the white migration.[8] The Indians were a people to be protected, not sovereign nations.

Fourthly, the argument of the Tribe and the United States collides with another historical fact. Provisions explicitly granting to Indian tribes criminal jurisdiction over non-Indians were common in the early treaties. The provisions in the early Cherokee treaties, discussed at p. 6, *supra*, are but two examples. Altogether, there were nine treaties containing such a provision. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 531, n. 128 (1976).

But all of these treaties were signed before 1796. No treaties thereafter contained any such provision. And this provision was later abrogated for most, though not all, of the original nine. Clinton, *ibid*, at 531, n. 130.

When it was the policy of the United States that its citizens should be subject to the criminal laws of an Indian tribe, that policy was expressly stated in a treaty. Further, that policy was deliberately

[8]We attach as Appendices A and B those portions of Ex. USA 20 and Ex. USA 27a referred to in the quotation from *U.S. v. Washington*, 384 F. Supp. 312, aff'd. 520 F.2d 676, cert. den. 423 US 1086, ren. den. 424 US 978. Both exhibits were prepared by Barbara Lane, Ph.D., the anthropological expert witness for the United States.

discarded before the end of the 18th century. Yet the argument of the Tribe and the United States would resurrect it, under the guise of tribal sovereignty.

3. *The Starting Point of the Petitioners: McClanahan v. Arizona Tax Commission.*

The starting point of the Tribe and the United States, inherent Indian tribal sovereignty, has been aptly described by this Court as a "Platonic notion [s]." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973):

> The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, e.g., United States v Kagama, 118 US 375, 30 L Ed 228, 6 S Ct 1109 (1886), with Kennerly v District Court, 400 US 423, 27 L Ed 2d 507, 91 S Ct 480 (1971). 411 US at 172.

As in *Worcester*, so also in *McClanahan* the issue was the applicability of state law to an Indian reservation. Yet even in this context, "platonic notions" cannot provide a substitute for non-existent statutory or treaty language. Such notions only provide a "backdrop" against which treaty or statutory language must be read. *Ibid.*[9]

The approach taken in *McClanahan* should be taken in this case as well. If a power claimed by an Indian tribe cannot be found in a fair reading of a

[9]The approach taken in *Worcester* and that taken in *McClanahan* are, we submit, essentially the same. The rights of an Indian tribe are to be determined from a reading of the applicable treaties and statutes. *McClanahan* is rejecting only intervening glosses upon *Worcester*, not its reasoning and holding.

treaty or statutory provision, the power does not exist; "platonic notions" cannot supply that power.

McClanahan also shows both the proper source and the true nature of Indian tribal self-government —as distinguished from tribal "sovereignty." The primary source of tribal self-government is the typical treaty provision setting aside a geographical area for the exclusive use of the Indian tribe and its members. This provision blocks the application of state law, including state tax law, to reservation Indians. For the treaty right is, in essence, the right to be left alone.

Further, recognition of this limited right to self-government fits with historical realities. All Indians, including those of the Puget Sound area, were in a real sense a separate people, pursuing their separate mode of life before the non-Indian came. Treaties such as the Treaty of Point Elliott were intended to allow the Indians to continue this separate mode of life, but within the confines of the reservation.

To continue to be treated as a separate people is quite different from being treated as a sovereign nation, as the history of the Puget Sound Tribes reminds us. And similarly the right to be free from non-Indian law is quite different from the power to subject a non-Indian to Indian law.

Unless the *McClanahan* approach be adopted in this case, insoluble dilemmas are created.

To subject non-Indians to the general governmental power of a tribe, including tribal criminal

power, while denying them the right to participate in Indian government through the franchise, would constitute a violation of the non-Indians' constitutional rights under the Fifth and Fifteenth Amendments. Yet, as the situation on the Port Madison reservation illustrates, to grant the non-Indians the franchise would effectively destroy tribal self-government; for the non-Indian residents vastly outnumber the tribal members.

If the "platonic notion" of tribal sovereignty is adopted, this dilemma is unavoidable. Under the *McClanahan* approach, however, it does not arise. Since no treaty or statutory provision grants this criminal power over non-Indians, the power does not exist. And tribal self-government, as so confined, can continue to exist.

A similar dilemma arises on the procedural level. Non-Indians are not only disenfranchised, but they are disqualified from serving on Suquamish Tribal juries as well. A constitutionally valid trial for the petitioners in the tribal court is impossible. *Reid v. Covert*, 354 US 1 (1957). The constitutional defect might be curable, by placing non-Indians on tribal juries. But again, there is a cost—a diminution in tribal self-government. The dilemma can only be avoided by confining the jurisdiction of tribal courts to tribal members.

The *McClanahan* approach also provides an accommodation between the right of the Indians to tribal self-government and the expectations of the

non-Indian residents on the Port Madison Reservation—expectations fostered by the federal government.

Until now, the position of both the Attorney General and the Department of Interior has been that Indian tribes do not have criminal jurisdiction over non-Indians. Whether that position has been consistently correct or, as suggested by the United States, consistently incorrect is irrelevant to our point.[10] The fact is that this has been the consistent position conveyed by the administrative agencies of the United States government to the citizens of the United States.

Moreover, despite all the twistings and turnings of federal Indian policy, the Congress itself has never suggested that this position was incorrect.

The *McClanahan* approach also parallels exactly the decisions of this Court involving Indian land claims. For an Indian tribe to establish a compensable claim to land, there must be congressional recognition, expressed in a treaty or statute, of the tribe's right to own a specific portion of land. Absent such recognition, the tribal right does not exist and the claim must be denied. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955). Platonic notions of Indian sovereignty will not serve to unlock the federal treasury; the key must be found in specific statutory or treaty language. No less strict a standard should

[10]See U.S. Br. 41-43, discussing 2 Op. Atty. Gen. 693 (1834), 7 Op. Atty. Gen. 174 (1855) and 77 I.D. 113.

apply to tribal claims of criminal power over non-Indians.

As the foregoing shows, our disagreements with the Tribe and the United States are total; they relate as much to the questions to be asked as to the answers to be given. For example, the United States asserts the "principal issue" to be "* * * whether 18 U.S.C. 1152 ousts tribal jurisdiction * * * in favor of exclusive federal jurisdiction." (U.S. Br. 12)

This is not the principal issue at all. The issue of the effect of 18 U.S.C. 1152, though important, is subsidiary. Certainly, we contend that if jurisdiction of the type asserted here ever existed, § 1152 ousted it. But the primary lesson to be learned from § 1152 is that Congress never recognized such jurisdiction as existing in the first place.

ARGUMENT

A. An Indian Tribe Has only those Attributes of Sovereignty Granted by a Treaty or Statute. Absent Such a Grant, They Do Not Exist.

1. *The Status of an Indian Tribe in the Absence of a Treaty—The Indian Land Cases.*

The underlying assumption of the Tribe and the United States is that every Indian tribe was once a sovereign nation, with all the attributes of sovereignty. A treaty merely recognizes this pre-existing sovereign status, which remains undiminished unless expressly diminished by the treaty itself. This assumption is the basis of their entire argument. If this assumption fails, the argument fails.

Let us test out this assumption.

Surely one of the principal attributes of a sovereign nation is the power to own and dispose of its land to whomever it wishes. Yet, in his seminal opinion dealing with the powers of an Indian tribe, Chief Justice Marshall denied that power.

"The great case of *Johnson v. McIntosh*, 8 Wheat 543, denied the power of an Indian tribe to pass their right of occupancy to another." *Tee-Hit-Ton Indians v. U. S.*, 348 U.S. 272, at 279, 280 (1955). Indeed, *Johnson* denied not just the power to pass the right of occupancy, but the power to own and pass title as well.

The reason for this result is as important as the result itself. In his Commentaries on the Constitution (5th Ed. Boston, 1891), written in 1833, Justice

Story explains the origin of the law of Indian title as follows:

> We have also seen that the title of the Indians was not treated as a right of propriety and dominion, but as a mere right of occupancy. * * * *they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations.* * * * (Emphasis supplied) Vol. I, p. 106.

From what source, then do Indian tribes receive any attributes of sovereignty, such as the power to own and pass title to land? For they certainly do not receive this attribute from a judicially recognized preexisting status as sovereigns.

The answer can be found, we suggest, by examining modern applications of *Johnson v. M'Intosh*, *supra*. *Tee-Hit-Ton Indians v. U.S.*, *supra*, is just such an example.

This case involved a claim for compensation under the Fifth Amendment by a clan of the Tlingit Tribe in Alaska for a taking by the United States of timber from lands allegedly belonging to the clan. The United States argued that Congress had never recognized any compensable interest, and that accordingly no compensation was due. Since there was no applicable treaty, the question became whether there was a statute recognizing such an interest, i.e., a right of permanent occupancy. This Court held that there was not, stating,

> * * * There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways *but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.* * * * (Emphasis supplied) 348 U.S. 272, at 278, 279.

The same rule applies with respect to treaties; absent language which can be fairly read as recognizing the Indians' legal right of permanent occupancy, it does not exist. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945). Aboriginal Indian title to land, unrecognized by either statute or treaty, is a legal non-entity. In legal effect, to "recognize" rights is to "accord" or "grant" them.

As stated in *Tee-Hit-Ton Indians*, *supra*, at 289, 290:

> * * * Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

It is only the conquerors' will, manifested in a statute or treaty, which gives them any rights in land.

We discuss *Johnson v. M'Intosh* and its application in subsequent cases for three reasons. First, they place the notion of aboriginal tribal sovereignty

in proper perspective. It simply does not exist.[11] As shown by Justice Story, it was the denial of any such sovereignty which formed the basis for the whole development of the law in this field.

Secondly, the rule consistently applied by this Court when an Indian tribe claims one attribute of sovereignty, the right of land ownership is, we submit, also applicable when an Indian tribe, as here, claims another attribute of sovereignty, the right to impose its will on all inhabitants within a reservation. What is at stake in these cases is the right of Messrs. Oliphant and Belgarde, as residents on the Port Madison reservation, to be protected from a legal system in which, by reason of their race, they can have no voice. Surely that right is no less important, and no less deserving of protection from this Court than the right of the federal government to keep its treasury intact.

Thirdly, the approach taken in the Indian land cases parallels that described and followed in *McClanahan v. Arizona Tax Comm'n, supra.* It asks: Are the rights being claimed granted or recognized by treaty or statute? If such treaty or statutory language cannot be found, the "platonic notion" of tribal sovereignty will not provide a substitute; the rights being claimed must be denied.

[11]As shown by the dissents in *Tee-Hit-Ton, supra,* and *Northwestern Bands of Shoshone Indians, supra,* whether valid land claims exist in any given case is not always an easy question. But there is no disagreement over the proper starting point; congressional recognition must be shown to exist. Here, in contrast, there is a basic dispute as to the proper starting point, with each side realizing that if their starting point be accepted by this Court, the probability of their prevailing is increased tremendously. And in our view, the starting point here should be the same as in the Indian land cases.

Duwamish et al. Indians v. U.S., 79 C. Cls. 530 (1934), *cert. den.*, 295 U.S 755, provides an excellent example of the application of this approach to Indian tribes in the State of Washington. This case involved various types of claims, including claims by both treaty and non-treaty tribes for land supposedly taken from the tribes. The claims of the non-treaty tribes were denied, squarely on the basis of *Johnson v. M'Intosh*, 79 C. Cls. 530, at 598. And as stated by the court:

> While we may well suppose that the Government would not intentionally take from Indian tribes their claimed tribal lands without compensation, established precedents hold that the authority to do so exists *and until Congress grants lands to the Indians, either in treaties or acts of Congress* and afterwards takes them, a special act worded as in the instant case confers upon this court no jurisdiction to award a judgment as herein claimed. (Emphasis supplied) 79 C. Cls. 530 at 603.

The "chain of sovereignty" to the State of Washington merits a closer examination for two reasons. First, it shows that the sovereignty of the United States was derived from discovery, settlement, and treaties with other nations. It did not derive from the Indians.[12] Secondly, the Indians were to be treated, not as sovereign nations, but solely as groups whose persons and property should not be harmed.

[12]For an interesting discussion of U.S. sovereignty over what is now Washington by Jefferson's Secretary of the Treasury, see Gallatin, *The Oregon Question* (Bartlett and Welford, New York, 1846).

The United States claimed the area now embraced within the State of Washington by discovery and settlement and by the treaty extinguishment of conflicting claims of Spain (Treaty of February 22, 1819, 8 Stat. 252), *Russia* (Convention of April 17, 1824, 8 Stat. 302), *and Great Britain* (Treaty of June 15, 1846, 9 Stat. 869). By the Act of August 14, 1848, 9 Stat. 323, the United States established the Oregon Territory and provided that nothing contained in said act "*shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory*, so long as such rights shall remain unextinguished by treaty between the United States and such Indians * * *." *United States v. State of Washington*, 384 F.Supp. 312 at 353 (1974). (Emphasis supplied.)

All of these treaties and Acts[13] of Congress were adopted before any treaty-making took place with Indians in the State of Washington. The obvious policy embodied in these various acts was to protect the Indians, in their persons and property, during this interim period. Their right to occupancy was to be respected; but they were not in any way to be recognized as sovereigns.

2. *The Effect of Tribal Self-Government as a Shield Against the Application of State Law on Indian Reservations: "Exclusive Use" Language in a Treaty.*

The United States and the Tribe might contend

[13]We here refer to the act establishing the Washington Territory out of the Oregon Territory, mentioned later in the opinion.

that the very same treaty language which recognizes the right to ownership of specific land also constitutes recognition of sovereignty over that land as well. Article II of the Treaty of Point Elliott, for example, states:

> There is, however, reserved for the present use and occupation of said tribes and bands the following tracts of land, viz: * * *

Then follows a description of the lands reserved, in terms of sections and acres.

Any argument that such language constitutes a recognition of sovereignty presents at least three problems. First, while it is impossible to imagine a sovereign which does not have the right to own land, it is easy to imagine a landowner who is not a sovereign. Any private corporation will serve as an example.

The second problem is found in an interesting feature of the treaty itself. Even if the treaty be viewed as recognizing the Suquamish Tribe as a separate and distinct political entity, the treaty does not indicate what land that political entity is to own. For the treaty was negotiated with, and the lands were set aside for, twenty-two named tribes and bands, of which the Suquamish were only one. The treaty lumps all of the tribes and bands together, without in any way stating which portion of the lands reserved belongs to any specific tribe or band. The treaty does not even tell us which Indian group

owns what land, much less which group has "sovereignty" over such land.[14]

Thirdly, as *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) reminds us, even the right of tribal self-government—which is something quite different from "sovereignty"[15]—is grounded on treaty language different from that which grants the right to land ownership.

In *McClanahan*, the issue was whether the state of Arizona could impose its income tax on a Navajo Indian who lived on the Navajo reservation and there earned the income which the state was attempting to tax. This Court denied that power. And eschewing any "platonic notion" of inherent tribal sovereignty, it based its decision on specific treaty language. And the critical factor is that this language reserved land for the *exclusive* use of the Navajo Tribe.

> The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo Nation in 1868. The agreement provided, in relevant part, that a prescribed reservation would be set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the govern-

[14]The record does not disclose how things finally became sorted out. Presumably it was by executive action. If so, then under the argument of the United States and the Tribe, criminal jurisdiction over Messers. Oliphant and Belgarde is really grounded on neither a treaty provision nor a statute, but on a discretionary executive order —surely a strange result.

[15]See brief of State of Washington as amicus curiae, pp 17-23.

> ment, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat 667, 668. 411 U.S. at 173, 174.

As noted by this Court, neither this language nor any other language in the treaty expressly stated that state tax laws could not cross the reservation boundary so as to reach the Navajos. But a fair reading of this language required such a result. 411 U.S. at 174, 175. And subsequent federal legislation recognized that this was the result of such language. 411 U.S. at 175. "Exclusive use" meant: "State law must stay out."

This same treaty language explains the result in *Williams v. Lee*, 358 U.S. 217 (1959). Here the person attempting to exert his authority under state law was not a state tax collector but a debt collector. The precise issue was whether state law and the state court system could be utilized to collect a debt owed by a reservation Indian to a non-Indian creditor, the debt arising from a transaction which took place on the reservation. Again, this Court held that state law could not penetrate the boundary of the Navajo reservation. Accordingly, the non-Indian creditor was left with whatever remedies he could find under Navajo law.

The treaty of Point Elliott contains language

paralleling that in the Navajo treaty. The second sentence of Article II states:

> * * * All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them. 12 Stat. 927.

Although this language may provide a shield, to keep state law from penetrating the reservation, does it provide a sword as well, which the Tribe may use to impose its law upon Messrs. Belgarde and Oliphant? We take up this question directly under the next heading. Here we make only two points. First, even the shield which this language provides has large holes in it.

In *Puyallup Tribe v. Washington State Game Department*, ... U.S. ....., 97 S.Ct. 2616 (1977), one of the issues was the right of the state to regulate Indian fishing on Puyallup River, which was within the exterior boundaries of the Puyallup reservation. This Court upheld that right.

> Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was "set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent." It is argued that these words amount to a reservation of a right to fish free of state interference. Such an interpretation clashes with the subsequent history of the reservation and the facts of this case. Pursuant to two acts of Congress, 27 Stat. 633 (1893), and 33 Stat. 565 (1904), the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000 acre reservation. None of the 22 acres abuts on the Puyallup River. Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their "exclusive use." * * * 97 S.Ct. 2622.

The subsequent history of the Port Madison reservation is similar to that of the Puyallup reservation. Over half of the land is no longer in Indian ownership. It was on such land that Mr. Belgarde's alleged offense took place. Moreover, even some of the land still retained under Indian ownership can hardly be viewed as reserved for exclusive Indian use; for the Indians have leased it out to non-Indians. It was on such land that Mr. Oliphant's alleged offense took place.

If, as *McClanahan* shows, tribal self-government is grounded upon the "exclusive use" language of the relevant treaty, then, as *Puyallup* shows, that language is not effective to establish such self-government on lands no longer under Indian ownership; state law reaches such lands. Indeed, we submit that it may reach certain lands in Indian ownership as well, if it be leased out to non-Indians.

And if such language cannot provide a shield

on such lands, how can it provide any sort of sword?

Secondly, *Williams v. Lee* does not show that this language provides an adequate basis for the jurisdiction being asserted here, as the Tribe and the U.S. seem to suggest. (Tribal Br. 49-51, U.S. Br. 15, 18) Again, this language deprived a non-Indian creditor of any right to use state law to collect a debt from a reservation Indian. As a result, the only collection tools left to him were those provided by Indian law.

It is one thing to leave a non-Indian who chooses to do business with Indians on a reservation in the position of having to rely solely on Indian law to collect business debts. It is quite another to make a non-Indian subject to general tribal criminal jurisdiction just because he happens to live on a reservation. The first result flows from the "exclusive use" language of the treaty, which sets up a barrier to state law. The second result does not flow from such language at all; it flows only from a "platonic notion," based upon a misreading and misapplication of *Worcester v. Georgia.* We examine that notion next.

3. *The Misapplication of Worcester v. Georgia by the Tribe and the United States.*

This is not the first case in recent years in which this Court has been called to examine exactly what Chief Justice Marshall held in one of his seminal opinions. *Cf., Michelin Tire Corp. v. Wages*, 423 US 276 (1976), overruling *Low v. Austin*, 80 U.S.

(13 Wall.) 29 (1871), and thereby correcting *Low's* misapplication of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

We start with the obvious: Mr. Samuel Worcester had been sentenced to a Georgia jail by a Georgia court and not to Cherokee jail by a Cherokee court. The issue directly involved was the validity of an assertion of criminal jurisdiction by the state of Georgia, not by the Cherokees.

However, the powers of the Cherokees were certainly a central issue. This becomes clear from Chief Justice Marshall's description of Mr. Worcester's plea entered in defense in the Georgia court.

The plea averred:

> * * * That the treaties subsisting between the United States and the Cherokees, acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America. * * * 6 Pet. (31 U.S.) at 540.

In determining the validity of the plea, Chief Justice Marshall examined the provisions of two treaties, the treaty of Hopewell, 7 Stat. 18, (1785) and the treaty of Holston, 7 Stat. 39, (1791). On the basis of this examination, he concluded that these treaties did substantiate the plea.

Among the provisions of the treaty of Hopewell examined by the Chief Justice were three explicitly bearing on the question of criminal jurisdiction.

They are Articles V, VI, and VII; while the Chief Justice paraphrased them, we quote them:

ARTICLE V.

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands westward or southward of the said boundary which are hereby allotted to the Indians for their hunting grounds, or having already settled and will not remove from the same within six months after the ratification of this treaty, such person shall forfeit the protection of the United States, and the Indians may punish him or not as they please.

ARTICLE VI.

> If any Indian or Indians, or person residing among them, or who shall take refuge in their nation, shall commit a robbery, or murder, or other capital crime, on any citizen of the United States, or person under their protection, the nation, or the tribe to which such offender or offenders may belong, shall be bound to deliver him or them up to be punished according to the ordinances of the United States; Provided, that the punishment shall not be greater than if the robbery or murder, or other capital crime had been committed by a citizen on a citizen.

ARTICLE VII.

> If any citizen of the United States, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States; and the punishment shall be in presence of some of the Cherokees, if any shall attend at the time and place, and that they may have an opportunity so to do, due notice of the time of such intended punishment shall be sent to some one of the tribes.

After describing these provisions, he states, with particular reference to the last two: "The only inference to be drawn from them is, that the United States considered the Cherokees as a nation." 6 Pet. at 553.

The analysis is inductive, not deductive. The specific powers of the Cherokees expressly granted or recognized in the treaties supported the general conclusion that the Cherokees were considered as a nation. *The conclusion was not reached first, and the specific powers then derived from that conclusion. There is no suggestion whatsoever in the opinion that these specific treaty provisions, upon which Justice Marshall relied to support his conclusion, were unnecessary and that the result would have been the same without them.*

We note also that under the treaty, the Cherokees did not have all the powers one would expect a sovereign nation to have. If a non-Indian settled on Cherokee land, Art. V provided that he was under the exclusive law of the Cherokees, presumably as either an offender or a victim. Otherwise, both in the case of an Indian committing a serious crime against a non-Indian (Art. VI) and in the reverse case of a non-Indian committing a serious crime against an

Indian (Art. VII), punishment was to be according to United States, not Cherokee, law.

Thus, the treaty of Hopewell did not even grant to the Cherokees a normal attribute of sovereignty, and one which the Tribe and the United States presumably would argue belongs to the Suquamish Tribe. This is the attribute which allows a sovereign nation to punish according to its own law, anyone and everyone who happens to be within its geographical jurisdiction, whether he has "settled" there or not.

The Chief Justice turned next to the treaty of Holston, and examined, among others, Article VIII, X and XI of the treaty. 6 Pet. at 556. See 7 Stat. 39 (1791).

These are essentially the same as Articles V, VI and VII of the treaty of Hopewell; and the Chief Justice reaches the same conclusion from them as he did from their counterparts.

> The remaining articles [including Articles X and XI] are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself. 6 Pet. at 556.

Again, the Cherokees had only those powers of "sovereignty" expressly provided for in the treaty—no less and certainly no more.

A provision similar to those in Article V of the treaty in Hopewell and Art. VIII of the treaty of Holston "* * * appears in almost all of the early treaties." (Tribal Br. 16.) These other early

treaties are listed by the Tribe at p. 16, note 19. Cf. p. 9, *supra*.

The reading of *Worcester* urged by the Tribe and the United States would automatically endow every Indian tribe with all the attributes of sovereignty unless an attribute is expressly denied by treaty. Yet, such a reading would make all these early treaty provisions redundant and totally unnecessary.

Moreover, as shown at page 9, *supra*, after 1796 these provisions were no longer included in treaties. The policy embodied in them was discarded. Yet according to the reading of *Worcester* urged by the Tribe and the United States, this policy must be resurrected: the tribes entering into these later treaties—such as the Suquamish—would possess the power conferred by these provisions in any event, unless expressly denied by another treaty provision.

Worcester, we submit, neither requires nor even suggests such absurdities. The approach taken by Chief Justice Marshall follows exactly that which was taken in *McClanahan* and which should be taken here. By focusing on powers conferred by specific treaty provisions, it avoids both platonic notions and historical distortions, while guaranteeing to the tribes those rights which the United States intended they should have.

4. *The Treaty Draft of 1854.*

The Tribe focuses on other absent treaty provisions, i.e., those included in Articles VIII and XII

of the 1854 treaty draft contained at Tribal Br. A-19. (Cf. Tribal Br. 42, 43). The elimination of the language in Art. VIII of the draft, stating that offenses by non-Indians against Indians would be punished only by the United States, shows, according to the Tribe, that the Treaty of Point Elliott was intended to allow Indians to punish non-Indians for such offenses.

But how does the Tribe explain the elimination of Article XII of the draft, which stated that the Indians were to punish Indians for offenses against Indian law? Did the elimination of this language from the Treaty of Point Elliott deprive the Tribe of this power and leave it only with the United States? The Tribe's reasoning requires this result.

Moreover, if the Tribe is suggesting that these provisions were somehow "negotiated out", such a suggestion is incorrect, as is shown by the same microfilmed materials relating to the history of the Point Elliott Treaty as are cited at Tribal Br. 42, note 60.

The elimination of both sets of provisions is easily explained. Commissioner Gibbs was a lawyer. (Tribal Br. 42) He presumably knew of the existence of what is now 18 U.S.C. 1152, pursuant to which federal law applied unless both wrongdoer and victim were Indians, in which case Indian law applied. Therefore both sets of provisions were redundant.

B. To Make a non-Indian Subject to the Suquamish Tribal Code, when that non-Indian is Completely Disenfranchised by the Suquamish Tribe, Constitutes a Violation of the Fifth and Fifteenth Amendments of the U.S. Constitution and the Similar Guarantees Contained in the Indian Civil Rights Act.

We address here, the most distressing aspect of this whole case. The United States touches on this aspect only slightly (U.S. Br. 45) and the Tribe not at all.[16] Yet it is undoubtedly the reason for the attempts of both to make the Tribe's jurisdictional claims appear less broad than they really are.

The Fifteenth Amendment provides, in section 1:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

If the State of Washington were to attempt to deny members of the Suquamish tribe the right to vote in state and local elections, there can be no doubt that the attempt would be declared a violation of the Fifteenth Amendment. And this would be so

[16]The United States hints at the problem:

> On the other hand, it is arguable that white residents of Indian reservations, some of whose ancestors settled long ago at the invitation of the federal government, under the assumption that they would not be subjected to tribal law, have a strong claim. That concern has been importantly reduced by the Indian Civil Rights Act, 25 U.S.C. 1301, 1302, 1311. Nevertheless, at the end of the day, it may be that the Tribes will have to choose between narrowing the territorial jurisdiction of their laws and courts or admitting non-Indian residents to participation, at least on juries. But, as the court of appeals stated, that is a matter that need not be resolved at this stage of the litigation. U.S. Br. 45, 46.

We submit that the Tribe is constitutionally required to choose—now. The matter of subjecting white residents to laws in the making of which they cannot participate must also be resolved—now. And it cannot be resolved by just putting non-Indians on juries.

even if the grounds of the denial were that the tribal members belonged to a separate and distinct political entity, the Suquamish Tribe. For they are citizens of the United States and any argument based on membership in a "distinct political entity" would be tossed aside as a patent subterfuge. The true basis of the denial of the franchise would be quickly seen—race.

The Suquamish Tribe wishes to extend its criminal code to non-Indians, yet deny them the franchise. And the reason for the denial is the same as in the converse situation—race.[17]

We are not here suggesting that the Fifteenth amendment applies to the Suquamish Tribe as such. But certainly it applies to the United States. After all, it is a purported *federal* policy—"contemporary federal Indian policy" to use the phrase of the Tribe (Tr. Br. 61)—that forms the subject matter of this case.

The whole argument of the United States and the Tribe is that under this purported federal policy, the Tribe may apply its criminal code to non-Indians, while denying them the right to vote. That is a policy which, we submit, the Fifteenth amendment prohibits the federal government from adopting.

[17]The racial basis of the denial of the franchise becomes clear upon an examination of the tribal constitution; to belong to the Tribe, one must have "Suquamish Indian blood." Art. II, Pet. App 5(a). Admittedly, other Indians are denied membership as well. But that is certainly irrelevant. If a state law denies the franchise to everyone except whites who can trace their ancestry back to a person who resided in this country prior to July 4, 1776, it would hardly be a proper defense of such a law, if attacked by blacks on Fifteenth amendment grounds, that most whites were disenfranchised too.

It is no answer to say that the policy choice is made by someone else, such as the Tribe, and not by the federal government. States have tried similar arguments in their attempts to justify racial discrimination. This Court has consistently rejected them. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), *Terry v. Adams*, 345 U.S. 461 (1953).

Further, even if the basis of the denial of the franchise to non-Indians be viewed as something other than racial in nature, this simply changes the grounds of the constitutional violation, from the Fifteenth amendment to the Fifth amendment.[18] It does not eliminate the violation itself.

In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), this Court invalidated, as violative of the equal protection provisions of the Fourteenth amendment, a Louisiana law which gave only property taxpayers the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility.

The city offered the argument that property taxpayers have a "special pecuniary interest," in that the efficient operation of the utility system affects property values and the investment of property owners. This Court rejected the argument, noting the obvious fact that the efficient operation of the utility system affects all residents, be they property owners or not, and then stating:

[18]The equal protection requirements of the Fourteenth amendment apply to the federal government by virtue of the Fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

> The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a "rational basis" for limiting the franchise to those voters with a "special interest," the statute clearly does not meet the "exacting standard of precision we require of statutes which selectively distribute the franchise." Kramer v Union Free School District No. 15, supra, at 632, 23 L Ed 2d at 592. 395 U.S. at 706.

According to the Tribe and the United States, the tribal criminal code is to apply to Indians and non-Indians alike. The non-Indians would thus be as substantially affected and directly interested as Indians in the election of those who adopt that Code. The Indians might indeed have some sort of "special interest" in that Code, though we find it hard to imagine what it might be. In any event, it should be treated the same as the "special interest" offered by the City of Houma.

If we shift our focus from the level of the federal government to that of the Tribe itself, the problem still remains. 25 U.S.C. 1302(8) provides in pertinent part as follows:

> "No Indian tribe in exercising powers of self-government shall:
> "* * *
> "(8) deny to any person within its jurisdiction

> the equal protection of its laws or deprive any person of liberty or property without due process of law."

This statute is part of the 1968 Indian Civil Rights Act, 82 Stat. 77. It makes applicable to a tribe the same fundamental requirements of the Fourteenth amendment as are applicable to any state or subdivision of a state. And if a tribe attempts to bring within its criminal jurisdiction all non-Indian residents, as well as Indian residents, those fundamental requirements of equal protection demand that the non-Indians be given the right to vote. *Cf. Cipriano, supra, Dunn v. Blumstein,* 405 U.S. 330 (1972). See generally Karst, Equal Citizenship under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977).

It might be countered that one cannot challenge the validity of a law on the grounds that the person to whom the law applies has been excluded from the law-making process. The usual procedure would be to have the courts remove the exclusion and vindicate the right to vote, leaving the challenged law intact. We agree.

It may also be urged that giving non-Indians the franchise would destroy the Indians' power of self-government because they are so small a minority on their own reservation. Again we agree.

How, then, can the constitutional—and statutory—rights of the non-Indians be preserved, while preserving tribal self-government at the same time.

There is only one way to reach this goal. The scope of tribal self-government must be confined—to true self-government—strictly to members of the tribe. To expand it, as the United States and the Tribe wish to expand it here, is necessarily to destroy it, on the anvil of the constitution and the Indian Civil Rights Act.[19]

The Tribe, and perhaps even the United States, would argue that this expanded notion of tribal self-government is precisely what is guaranteed by the treaty of Point Elliott. If that be the effect of the treaty, then that portion of the treaty containing such a guarantee must fall. (We assume, *arguendo*, that treaty language containing such a guarantee can be found in the first place.) Congress may not, under the treaty-making power, deprive citizens of their constitutional rights. *Reid v. Covert*, 354 U.S. 1 (1954).

Problems similar to those we have discussed appear, although in less aggravated form, when one considers the problem of procedural due process. By tribal resolution dated June 12, 1977, the right to serve on a tribal jury was reserved to tribal members only. (Pet. App. 65a) But those tribal members do not have to be residents of the reservation. *Ibid.*

[19] *U.S. v. Mazurie*, 419 U.S. 544 (1975) provides no escape from the dilemma. If federal law prohibited the sale of alcoholic beverages in Indian country, certainly no constitutional problem would be presented. And making such a prohibition dependent, in whole or in part, on the concurrence of those for whose benefit the prohibition is intended, the Indians, presents no such problem either. That was, in essence, the situation in *Mazurie*. And that is a fundamentally different situation from that presented here, in which the Tribe asserts general criminal jurisdiction over everyone within the reservation.

Thus, Messrs. Oliphant and Belgarde face the prospect of facing a jury which will certainly contain no fellow non-Indians, and might even contain no fellow reservation residents either. This hardly measures up to the constitutional standard of a jury of one's peers. *Cf., Reid v. Covert, supra.*

Admittedly, if Messrs. Oliphant and Belgarde are tried by the Tribe, the Tribe may by then have amended its ordinance to remedy this glaring defect; and if it has not, the issue can be raised through normal post-conviction procedures. In this sense, the issue may be technically premature, as suggested by the majority in the court below.

But the issue is still relevant. The Tribe undoubtedly views its resolution governing jury selection as but another exercise of its right of tribal self-government. Any change in the selection procedures would be, under this view, a diminution of such a right. And the Tribe's point would be well taken.

But this shows once again the underlying dilemma. The Tribe's claims to an expanded notion of "sovereignty"—to use the term the Tribe undoubtedly prefers—simply cannot be reconciled with the fundamental constitutional rights, both substantive and procedural, of those non-Indians to whom this expanded notion applies. The right of Tribal self-government, including the right to have only Indians on a jury, can only be preserved by confining the substantive scope of that right strictly to members

of the tribe. To expand it to fit the Tribe's notion of "sovereignty" is to destroy it.

The substantive dilemma, if unresolved, immediately leads to a similar dilemma on the procedural level. The way out of both dilemmas is to restrict the scope of the Tribe's criminal jurisdiction.

C. Neither the General Allotment Act, nor the Indian Reorganization Act nor the Tribal Constitution Adopted thereunder Recognize the Tribal Criminal Jurisdiction over non-Indians.

If the federal policy in effect at the time of signing of the Treaty of Point Elliott had remained in effect, the problem now before this Court would probably have not even arisen. For the essence of that policy was this: Indians would stay on the reservation, and non-Indians would stay off. Each would leave the other alone, and for the most part "never the twain should meet."

But federal policy changed—drastically. In a series of allotment acts, the most important of which is the General Allotment Act of 1887, 24 Stat. 388, the reservations were broken up into allotments for individual tribal members, which were then frequently sold to non-Indians. It is this switch in federal policy which brought the non-Indians onto the Washington reservations en masse, including the Port Madison reservation.

This change in land policy was but part of a larger change. The new federal policy was nothing

less than the complete integration of Indians into non-Indian society. And as part of that integration, they were to become subject to state law.

As stated in section 6 of the General Allotment Act:

> "Each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."

A non-Indian settling on the Port Madison Reservation, pursuant to this new federal policy, was thus told by the federal government that his Indian neighbor would become subject to state law, and not that he would become subject to the law of his Indian neighbor.

The Indian Reorganization Act halted the break-up of the reservations, by stopping the allotment process.[20] But this Act gave no hint to the non-Indian neighbor that he was to become subject to Indian law.

Section 16 of the that Act, 25 USC 476, did empower the tribes to adopt a constitution. But not even that section suggests that the tribal constitution could extend tribal law to non-Indians.[21]

Pursuant to 25 USC 476, the Suquamish Tribe did in fact adopt a constitution. But that document as well would give no hint to the non-Indian neighbor

[20]Because the process of making Indians subject to state law was dependent on the continuation of the allotment process, the Act stopped the operation of section 6 of the General Allotment Act as well.

[21]25 USC 476 is quoted in full at Pet. App. 16a.

that he was to be subject to Indian law. It would tell him just the opposite. For the powers conferred under the constitution were expressly confined to tribal members. (Pet. App. 4a-6a.)

In the mid-fifties, federal policy switched again. Integration of Indians into non-Indian society, and subjection of Indians to the same law as their non-Indian neighbors, again became the goal, as evidenced by P.L. 83-280. As before, there was no warning that the non-Indian neighbor would become subject to Indian law. Just as in the late 1900's, the policy was just the reverse—to make the Indian subject to state law.

The Congress has vacillated back and forth on the issue of whether the Indian should become subject to general state law. But there has been no similar vacillation on the issue of whether the non-Indian should become subject to general Indian law. In all of these twistings and turnings of federal Indian policy, there has at least been this one constant.

D. **Absent a Vesting of Criminal Jurisdiction in the State, Federal Criminal Jurisdiction under 18 USC 1152 is Exclusive over non-Indian Offenders on the Port Madison Reservation.**

1. *The Primary Submission of the United States.*

The United States contends (U.S. Br. 26-38) that the Treaty of Point Elliott has reserved to the Suquamish Tribe criminal jurisdiction over all non-

Indian offenders. More importantly, that tribal jurisdiction is *exclusive*, with the result that the "treaty exception" in § 1152 applies. This treaty exception removes from the scope of § 1152:

> "any case where, *by treaty stipulations*, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." (Emphasis supplied)

But the United States can point to no specific language in the treaty expressly conferring such exclusive jurisdiction. And the phrase "treaty stipulations" would certainly suggest that such express language must be found.

Such express treaty stipulations were, as we have seen at pp. 9, 30, *supra*, often included in the early treaties. No stipulation even remotely similar was included in the Treaty of Point Elliott.

What the drafters of the treaty exception had in mind is shown in a decision of this Court which is the first—to our knowledge—to involve an application of that exception. *Ex parte Mayfield*, 141 U.S. 107 (1891).

At issue in *Mayfield* was the applicability of Article XIII of an 1866 treaty with the Cherokees, which read as follows:

> "The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive

> jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." 141 U.S. at 113.

Mayfield was convicted in federal court of the crime of committing adultery with a non-Indian. This Court held that since he was a citizen of the Cherokee nation, albeit adopted, and since he was the only party, he was within the scope of Article XIII. Accordingly, the treaty exception applied, and his conviction in federal court was overturned.

Apparently, in the view of the United States, the result would have been the same even if Article XIII had been absent from the treaty; it would be *implied*, just as with the Treaty of Point Elliott.

More significantly, the United States surely proves too much. It admits (U.S. Br. 35) that before 1968, the Suquamish Tribe had no police system or court system. Yet prior to that time, according to the United States, the Tribe had *exclusive* criminal jurisdiction over *all* crimes by non-Indians on the reservation.[22]

We have thus a strange result. The only governmental body with criminal jurisdiction over non-Indians had no police or court system. The two bodies which were enforcing the law on the reservation,

[22]Such was not the case, of course, with Indians, by reason of 18 USC 1153, the Major Crimes Act. But that Act applies *only* to Indians.

the federal government and the state, had no criminal jurisdiction whatsoever over non-Indians.

Moreover, this situation was presumably not confined to the Port Madison reservation. All of the treaties negotiated by Governor Stevens, and therefore all of the treaty reservations in Washington State would present an identical situation, because of identity of language.[23]

We are certain there are many non-Indians confined in either state or federal prisons for crimes they committed on Washington reservations, who would find the argument of the United States most interesting. If valid, it is their ticket to freedom.

Nor does the Indian Civil Rights Act of 1968 eliminate the problem with respect to crimes committed by non-Indians after its passage. That Act limits only the *sentencing power* of a tribe. 25 U.S.C. 1302(7). Contrary to the suggestion of the United States (U.S. Br. 36), it does not limit the scope of the asserted tribal *jurisdiction* to minor crimes.[24] The ticket to freedom is still current.

2. *The Alternative Submission of the United States.*

While the Tribe does not join in this first argu-

[23]Treaty of December 26, 1854, with the Nisqualli, Puyallup, etc., 10 Stat., 1132; Treaty of January 22, 1855, with the Dwamish, Suquamish, e[illegible] 12 Stat., 927; Treaty of January 26, 1855, with the S'Klallam, [illegible] Stat. 933; Treaty of January 31, 1855, with the Makah, 12 Stat. 939; Treaty of June 9, 1855, with the Yakima, 12 Stat. 951; Treaty of June 9, 1855, with the Walla Walla, Cayuse, etc., 12 Stat. 945; Treaty of June 11, 1855, with the Nez Perces, 12 Stat. 957; Treaty of July 1, 1855, with the Quinaielt, etc., 12 Stat. 971.

[24]The Tribe itself apparently shares our view. For the Law and Order Code includes a number of major crimes over which the Tribe maintains that it has concurrent jurisdiction. See p. 2, *supra*.

ment of the United States, it does join in the second viz., that any federal jurisdiction conferred under § 1152 is only concurrent with tribal jurisdiction. (U.S. Br. 38-41, Tribal Br. 28)

The major embarrassment here for the Tribe and the United States is the double jeopardy exception. This exception does show that federal and tribal jurisdiction would be concurrent in certain cases—but only where Indians were involved. Congress failed to apply the exception to non-Indians.

The United States attributes this failure to congressional oversight or neglect. (U.S. Br. 40). We find it difficult to assume that the Congress was so sensitive to the legal rights of the Indians and so insensitive to those of non-Indians. It is more reasonable to assume that Congress believed Indian Tribes to have no criminal jurisdiction over non-Indians at all. For in this belief, Congress would have been following the advice of the U. S. Attorney General on the subject, 2 Op. Atty. Gen. 693 (1834). Moreover, as shown by an examination of the treaty provisions discussed in that opinion[25] and 7 Op. Atty. Gen. 174 (1855), [26] Congress would have been following the pattern embodied in the then current treaties as well.

If federal jurisdiction over non-Indians is not exclusive of tribal jurisdiction, then the absence of a double jeopardy exception for non-Indians is still a current problem. At least, this will be so if this

[25]Treaty of September 27, 1830, with the Choctaws, 7 Stat. 333.
[26]Treaty of July 1, 1834, with the Chickasaw, 7 Stat. 450.

Court reverses the holding of the Ninth Circuit and sustains the position of the United States in *U.S. v. Wheeler*, No. 76-1629. The issue in that case is whether there is a constitutional bar to successive trials for the same offense in tribal and federal courts. If there is no such bar, Messrs. Oliphant and Belgarde, for example, could be tried for their alleged offenses both by a Tribal court and by a federal court as well, under 18 U.S.C. 1152 and 18 U.S.C. 13, the Assimilative Crimes Act. But an Indian could not be tried by federal court for similar offenses, if found guilty and punished by the Tribal court first. And this is by reason of the fact that the double jeopardy exception applies only to Indians.

If the United States is correct in its position here, that jurisdiction under § 1152 over non-Indians is concurrent with that of the Tribe, and if it is also correct in its position in *Wheeler*, a serious constitutional question is inevitably raised.

Finally, the view that federal jurisdiction over non-Indians under § 1152 is exclusive, rather than concurrent with the tribe, is precisely the view taken by this Court in *Ex Parte Mayfield*, 141 U.S. 107 (1891), discussed at p. 43, *supra*.

The United States does not discuss this important decision, and the Tribe completely misreads it. It deserves a more careful examination.

As previously noted, the precise issue was whether Article XIII[27] of the 1866 treaty with the Chero-

[27]Quoted *supra*, pp. 43, 44.

kees triggered the treaty exception in § 1152.[28] The Court held that it did.

The United States contended that Article XIII was not effective—and the treaty exception was thus inapplicable—because a federal court of general jurisdiction had not been established in the Indian territory, as contemplated by Article XIII.

In disposing of this argument, the Court reserved its opinion as to whether any such court was required at all in order to make the Article effective. It then stated that the Act of March 1, 1889 (25 Stat. 783) established such a court in any event. The Court next noted the existence of another act, *passed after the commission of the offense*, though before the indictment, which recognized the jurisdiction of native courts, and thus confirmed the effectiveness of Article XIII. This latter Act was that of May 2, 1890 (26 Stat. 81).

The function of the 1889 Act and the 1890 Act was solely to confirm the effectiveness of Article XIII. As we have noted, the Court expressed its doubts that such statutory confirmation was even necessary.

The Court went on:

> The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civiliza-

[28]Then codified as Rev. Stat. 2145, which contained the basic statute, and 2146, which contained the exceptions.

> tion. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith. The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side. 141 U.S. at 115, 116.

The "policy of Congress" is that embodied in §§ 2145, 2146 and Article XIII of the treaty. And the "Statutes" referred to must be §§ 2145 and 2146 Rev. Stat., and not, as the Tribe argues (Tribal Br. 38), just the 1889 and 1890 statutes. For the only statutes that were legally operative, in conjunction with the treaty, were §§ 2145 and 2146. Admittedly, the reference may include the 1890 statute, along with §§ 2145 and 2146. But that statute essentially just confirmed the effect of the treaty itself; that was its only relevance.

Lastly, note the use of the word "reserve". Actions falling within the scope of § 2145 are *reserved* to the courts of the United States. Under the system envisioned in § 2145, there is no room for concurrent jurisdiction with Indians over non-Indians.

E. The Issue of P. L. 83-280.

Thus far, we have argued only that the Tribe does not have criminal jurisdiction of the type asserted here. We have not addressed the question of where that jurisdiction actually lies, *i.e.*, in the State

of Washington or in the United States. Under our arguments, that question does not have to be addressed.

As correctly pointed out by the United States (U.S. Br. 50), that question is, however, presented in *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington*, 550 F.2d 443, remanded 552 F.2d 1332, rehearing denied, No. 74-1225, July 1, 1977. As further pointed out by the United States (U.S. Br. 51), assumption of jurisdiction by a state under Public Law 280, 67 Stat. 588 (1953) may well oust any federal *and tribal jurisdiction*. We would argue that such an ouster is the precise effect of Public Law 280, for the very reason suggested by the United States (U.S. Br. 51).

We prefer to argue all issues relating to Public Law 280 in the context of the *Yakima* case, not this one. And under our arguments in this case, they would not be reached. However, should this Court find in this case, contrary to our arguments, that the Tribe has jurisdiction, the Public Law 280 issues must then be considered.

If those issues be reached in this case, it may aid the Court in its consideration of them to have the benefit of full briefing and oral argument in *Yakima*. In this event, we would join the Washington State Attorney General in urging that probable jurisdiction in Yakima be noted, in order that the common issues in both cases may be considered together.

We would point out, however, that there are

certain Public Law 280 issues which are not common to this case and *Yakima*.

The basic issue in this case is the effect of Public Law 280 on non-Indians: does it apply at all to them? And if so, does it oust any tribal jurisdiction over them? The basic issue in *Yakima* is the applicability of Public Law 280 to Indians: did the State's partial assumption of jurisdiction over the Yakima reservation deny the Yakima Indians equal protection?

Further, the State's assumption of jurisdiction over the Port Madison reservation may not be just a partial assumption, as in *Yakima*. This issue turns on the effect of the attempted retrocession of jurisdiction in 1971 by Governor Evans. See Pet. 119-123. If that retrocession be void, the equal protection problem presented in *Yakima* is not presented here.

CONCLUSION

For the reasons given above, the judgments of the courts below should be reversed.

Respectfully submitted,

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APPENDIX A

Ex. USA 20, p. 28, in U.S. v. Washington, 384 F. Supp. 312 (1974).

D. **Signing the Treaties**

Generally, Indian signatories were individuals who had some sort of friendly contact with non-Indians. A few spoke Chinook jargon and probably most were men of importance in their communities, although they were not necessarily the most important men. The "head chiefs" were chosen by Simmons and Stevens. The "sub-chiefs" and "leading men" were selected by Simmons and Stevens, sometimes with the aid of the "head chiefs". The basis for choice were friendliness to Americans, real or apparent status in their communites, and ability to communicate in Chinook jargon. The "sub-chiefs" and "leading men" were intended by the U.S. to represent the bands to which they were thought to belong. Various "bands" and "fragments of tribes" were arbitrarily assigned a subordinate status to other "tribes", each of which had been assigned a "head chief". The latter were taken to represent not only the group to which they belonged, but all other groups which had been declared subordinate to it. The signatories, in the U.S. view, had the capacity to alienate land belonging to such groups. On the Indian side, there was no precedent for signing legal documents, nor was there any culturally sanctioned method of formally alienating land.

APPENDIX B

Ex USA 27a, pp 14-29 in U.S. v. Washington, 384 F. Supp. 312 (1974).

In 1854 the nature of native Coast Salish political organization in the Puget Sound area was not well understood by non-Indians. There appeared to be a bewildering number of politically autonomous village units composed of one or more multi-family dwellings. A village group might consist of a few dozen or over a hundred people. The villages were only occupied by the entire village group during the winter season. At other times of the year, portions of the population de-camped in different directions to secure food and other supplies. The village group did not move as a unit; rather family groups dispersed possibly to camp temporarily with family groups belonging to other winter villages. The particular combinations of co-resident families at these seasonal camps and fishing locations were not necessarily the same from year to year. The variations in size of winter villages and composition of seasonal camps made it impossible for outsiders to identify political units with any certainty.

Leaders were equally difficult to identify. They clearly existed, yet there were no village chiefs nor was any man chief over more than one village. Suttles (1963:513) describes the situation in the following manner:

> It appears that at the time of white settlement the whole area formed a social continuum within which the village was only one of several

equally important social groupings. On the basis of winter residence, we might distinguish four levels of discrete units: families, each occupying its own section of a cedar-plank house and maintaining its own domestic economy; house groups, each composed of several families (related through either males or females) occupying a plank house and co-operating as hosts of feasts and other ceremonies; villages, each composed of a group of such houses occupying a short stretch of beach or river bank and sharing a common name and identification with territory; tribes, generally composed of several villages occupying a longer stretch of shoreline or a drainage area and sharing a common name and, to some extent, forms of speech, subsistence methods, and ceremonial procedures. On the basis of kinship, however, we can distinguish at least one other kind of group: a nondiscrete, nonlocalized, property-holding kin group. It was this group or its head, rather than any of the residential groups, that owned the most important ceremonial rights and the most productive natural resources. Finally, on the basis of participation in the yearly round of subsistence activities and periodic ceremonial activities, we might distinguish a number of other social groupings, none of them necessarily identical with the residential units or the kin groups, some of them necessarily differing from them.

Within this whole, the village was certainly not a self-contained social unit. Individual and family ties were as strong between villages as within the village. Individual and family status was as dependent upon ties of marriage and kin-

ship with other villages as upon economic rights and traditional identity with one's own village. Within the village, people might co-operate in food-getting, exchange labor, and join in potlatching and mutual defense, but they were not obliged to do so by any formal village organization. There was no office of village chief and no village council. Co-operation was *ad hoc*. Leadership was for specific purposes and was exercised by virtue of specific skills, property rights, or supposed superhuman powers (see Barnett 1955:243; Duff 1952:81-82). Moreover, recognition of leadership came as much from outside the village as from within. Conflict within the village was often resolved by one party's leaving it.

Law and order were maintained in native Coast Salish society through a variety of social pressures, but these did not include exercise of authority by a "chief", "council", or policing group such as occurred among various Indian groups elsewhere. When friction occurred between individual Puget Sound Indians and white settlers, there was no head man in the Indian community who had authority, for example, to turn over offenders to the non-Indian authorities or who could dictate rules of behavior to other Indians vis-a-vis the whites.

Gibbs (Defendant's Exhibit 52, State v Moses, et al.) sent a report dated Olympia, February 7, 1854, concerning the murder of Captain Jewell by Clallam Indians to Governor Stevens. At page 4 he advised Stevens of the limited authority of chiefs

(called "tyees" in Chinook jargon) and recommended that the government take steps to alter the existing state of affairs.

> The usual course has I believe been where a criminal could not at once be taken, to seize the chief to whose band he belonged and retain him as a hostage for the delivery of the actual offender, and such I believe to be good policy. Mr. Wilson whose knowledge of these Indians is unquestionable, states indeed that the influence even of the principal chiefs is very limited. But if they do not possess the power of punishing, they certainly have through their immediate followers, as well as through their wealth a certain control, and it is desirable to compel them to exercise it. The wisest course for the government to pursue seems to be to aggrandize a few principal chiefs at the expense of the petty tyees; to recognize the former alone and to hold them responsible for all acts committed by their people. They will thus be compelled to exercise an authority which they did not before possess.

In a separate report prepared in January or February, 1854, Gibbs (1855:424) pointed out the difficulties in trying to control an indigenous population without strong chiefs and centralized authority. His earlier suggestion to aggrandize chiefs is repeated and to it he adds the recommendation to amalgamate small bands under a single head.

> One principle of policy, in particular, should be observed—the union of small bands under a single head. The maxim of divide and conquer does not apply among these people. They are

> never so disposed to mischief as when scattered and beyond control; whereas it is always in the power of the government to secure the influence of the chiefs, and through them to manage their people. Those who at present bear the name have not influence enough, and no proper opportunity should be spared of encouraging and supporting them in its extension.

Stevens evidently took up the suggestion, because the following month he proceeded on an expedition to arrest the murderers of a Mr. Young and took the occasion to appoint a number of chiefs and subchiefs. Evidently Gibbs accompanied the Governor and kept notes of the proceedings (Defendant's Exhibit 53, State v. Moses, et al.). This record is of crucial interest because it sets out plainly the manner and circumstances in which three of the four head chiefs and a number of sub-chiefs who later signed the Treaty of Point Elliott were selected.

> **March 10th.** Started for Seattle accompanied by the troops. Col. Wallace also went as a volunteer. Reached Seattle toward evening and met Mr. Tobin and other citizens who commenced preparations for an expedition against the Indians. Dr. Maynard had represented that the wish of the Citizens was that no troops should be employed, but no such sentiment had been expressed, or as far as we could learn existed.
>
> **March 11th.** The Indians were called together for a talk. There were present Patkanam with part of the Snoqualmoos and Seattle with those of the Dwamish in town, also George Seattle his son who is in effect chief of the Suquamish his fa-

ther's tribe proper. The Citizens likewise attended. Mr. Collins of the Dwamish river acted as interpreter, into Chinook and an Indian translated as he went on.

Gov. Stevens explained who he was, and why he was there. Several murders had recently been committed and should be punished. He would not punish the innocent for the guilty, but he should consider all as guilty who should assist or conceal the murderers. They were to understand that the whites would combine to punish all the Indians who were guilty of these crimes. The whites were as many as the trees and could kill them all. If the whites wronged the Indians, they were to come to him and he would set them right; they were not to revenge themselves. He would hold Patkanam and Seattle responsible for the good behavior of their respective people, and would appoint sub-chiefs to support them in their authority. The other Indians should remain at the place and keep quiet till his return. The Governor added that he had many Indians to attend to besides them & he had therefore appointed Col. Simmons agent or Chief over them to act in his place.

Patkanam said in reply that he was grieved on account of his own people, two of whom had been hung. That he was now afraid of the whites and should behave well. He and Seattle gave as the names of Cherry's murderers (?Young's)

Sleh-ho-haat }
Slach-ka-nam } Snohomish Indians

(*Note.* The persons alluded to by Patkanam were the ones hung at Stilacoom for the murder of an American named Wallace at Fort Nis-

qually, as detailed in Gen. Lane's report 1850.)

The following were then selected jointly by Col. Simmons & Patkanam as Snoqualmoo sub-chiefs.

Patkanam Head Chief
Squush-um
Klmsh-Ki-lum
S't-how-ah
Ne-queh-wis-atl
Tah-te-tum or John Kanam
St-meh-luch
Tah-ta-qualth
Sim-ka-meh-us
Te-uch-ke-lun-hoo
Sweh-le-quatl
Ye-tak-kwoo
Squul-la-kum

Governor Stevens ordered all to remain except those whom he should select to accompany him. The following were then recognized as Chief and Sub-chiefs of the Dwamish, Suquamish, and other tribes connected with them.

Seattle, head Chief
Schwoo-yehm or George Seattle
Sgoo-dahtl or Jake
Nah-wa-chais
Wil-lak or Jack
Sem-a-hahts-oot or Jack
S'he-doke-stan or Jim
Sma-keh-let-hoo
Sah-look-taw or Charley
S'hoo-dahch-tan
We-hehl-choo or John
Klow-is-sa
Steh-hum

Klim-shult-hoo
Se-guk-a-kwus
Kah-ka-hus
Kwah-ke-koo or Tom
Kwul-at-sut-hoot
Sul-a-whe h-oos
Also See-ah-num-kan
Yup-a-nee-chin
The two latter being particular followers of George Seattle, Suquamish, and
Nuk-shehm or John
Sto-daht or Bill
Dwamish Indians, strikers of old Seattle.
* * * *

March 17th. Part only of the Skagits attended. George's courage failed him and he ran off. Governor S. addressed the Skagits to the same effect as the other tribes and informed them that they must have chiefs who should be responsible if any thing was wrong. They should choose a head chief and he would appoint 15 good men to support him. They must obey the chief and the others stand by him. Mr. King, a citizen, acted as interpreter. The Indians seeming unwilling to make a choice, Gov. S. appointed
Goliah head Chief
and Kwal-lat-ta or Gen Pierce
Geo. Sneetlum
Squai-a-qui
Schee-ap-kee
Ha-lo-mits
Tenass George Sub-Chiefs

This document is revealing in that it clearly shows that the designation of chiefs and sub-chiefs

had little or nothing to do with indigenous political authority, but was dictated by the exigencies of the moment. The 'recognition' of Duwamish chiefs and sub-chiefs, of particular interest to us, apparently depended on which Duwamish happened to be in town. Gibbs notes that Stevens had to appoint the Skagit head chief and sub-chiefs because the Indians seemed unwilling to make a choice. The same circumstance was later met with the Makah.

Apart from Seattle, who signed the Treaty of Point Elliott as head chief of the Suquamish and Dwamish, only three sub-chiefs are identified on that document as Dwamish. One of them is Now-a-chais, clearly the Nah-wa-chais whose name is listed in second place on the roster of Suquamish and Dwamish sub-chiefs in the above journal record. The other two signatories identified on the treaty as Dwamish do not seem to be represented on this list.

After returning from the above expedition, Stevens (Defendant's Exhibit 54, State v. Moses, et al.), issued written instructions to Col. M. T. Simmons as Special Indian Agent for Puget Sound District relative to preparations for treaty negotiations.

> You are expected to enter forthwith upon a tour through the various tribes embraced within your District. For the purpose of acquainting yourself thoroughly with their condition, instructing them as to their relations with the citizens, and preparing the way for future negotia-

tions. For this purpose you will organize small bands, not at present united, by gathering them into tribes, having reference to their general affinities, and by procuring the selection of head Chiefs and of assistant or lesser tyees, over the larger existing tribes you will also direct the appointment of head and Sub-Chiefs, taking care that in every case they be persons who, in your opinion will control them to best advantage. To these respectively you will issue commissions of the forms enclosed, filling up the blanks & making a record of the persons to whom they are given. In commissioning those persons, whom you shall determine to recognize as chiefs or petty tyees, you will explain to them that hereafter they will be held responsible in the first place for all offenses committed against citizens by Indians of their tribe, that the head Chief will in such cases be called upon for delivery of offenders, and the smaller chiefs looked to for his support, but that should they be unable without assistance from the government to make arrests, such aid will be given at their request. You will likewise inform them that on failure to do their duty, they will be removed and others appointed in their place, and that in every case of resistance by a tribe to the authorities, it will be dispersed by force and not considered in any future treaties or in payments for lands.

Stevens received his official instructions to negotiate treaties with all Indians of Washington Territory in a letter dated August 30, 1854, from Charles E. Mix, Acting Commissioner of Indian Affairs.

These instructions give official sanction to the policy which Stevens had already initiated of creating fictitious tribes by appointing head men. The government clearly wished to avoid having to treat with 'each of the forty or fifty separate bands'.

> Sir: * * * In concluding articles of agreement and convention with the Indian tribes in Washington Territory, you will endeavor to unite the numerous bands and fragments of tribes into tribes and provide for the concentration of one or more of such tribes upon the reservations which may be set apart for their future homes.
>
> The formation of distinct relations with each of the forty or fifty separate bands of Indians in Washington Territory would not be as likely to promote the best interests of the white settlers or of the Indians as if the latter could be concentrated on a limited number of reservations, or on contiguous reservations, in a limited number of districts of country, apart from the settlement of the whites.
>
> Unless some arrangement can probably be effected you will at present conclude treaties with such tribes or bands only as are located immediately adjacent to the settlements of the whites, and between whom and our citizens animosities prevail, or disturbances of the peace are reasonably apprehended, and in entering upon the execution of the duty, with which you are hereby charged, you will turn your attention first to such tribes and bands.
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> It is desirable also that the stipulations to be fulfilled annually on the part of the United

States be few in number, and that the Department retain the authority to apply the funds to a variety of objects, such as the circumstances of the Indians at the time of payment may require.

This suggestion you will regard particularly, if you are unable to effect the combination of all the bands into six or eight tribes, or to arrange half a dozen treaties, or less, so that every one of the tribes shall be a party to them.

Stevens was faced with what appeared to be a large number of politically autonomous groups whose leaders seemingly had little authority to direct the behavior of others or to command a large following. He had official approval to create larger political entities, and by implication at least, to appoint head chiefs over these since the object was to have as few treaties and reservations as possible and to have 'distinct relations' with a smaller number of tribes. At the same time he was directed to include all the Indians in the treaties.

Once these problems and policies are understood, the plan for the Treaty of Point Elliott becomes clear. The treaty area extends from what is now the Canadian border, bounded on the east by the crest of the Cascade Mountains and on the west by the divide between the White and Puyallup rivers. It included several thousand people living along the bays and islands in the Sound and Straits and along the rivers which drain into the eastern half of Puget Sound. It included speakers of Straits Salish in the north,

Puget Sound Salish on the south, and a variety of sub-cultures. Stevens' solution in creating larger tribes out of the widely dispersed and somewhat heterogeneous congeries of people was to divide the area geographically by drainage system. He appointed a head chief for each of four of the largest river systems: The Lummi-Nooksack, the Skagit, Snoqualmi-Snohomish, and Duwamish. Each head chief was represented by Stevens to be chief over all the people on that drainage system, upriver groups being represented as subordinate bands of the new supertribes.

In a report prepared for Stevens in 1856 (although it was published much later), Gibbs (1877: 179-80) makes the plan explicit.

Below these is the division of which the Dwamish and Sukwamish are the principal bands, occupying Elliott Bay, Bainbridge Island, and a portion of the peninsula between Hood Canal and Admiralty Inlet. Their head chief is Se-aa-thl, or, as it is usually pronounced, Seattle, from whom the town on Elliott Bay has been named. In this connection are also the Samamish, Skopahmish, Sk'tehlmish, St'kamish, and other small bands lying upon the lakes and the branches of Dwamish River, who are claimed by the others as part of their tribe, but have in reality very little connection with them. A very few of these last possess horses, but the majority are river Indians. The aggregate number of the whole was by census 807, which probably falls a little short of the truth. They differ but

slightly from the Niskwalli in language. These tribes were included with all the others of the eastern shore and the islands in the treaty of Mukleteoh, or Point Elliott. A reserve of two sections was retained for them at Port Madison.

3d. The Snohomish, with whom are included the Snokwalmu, Skiwhamish, Sk'tah-le-jum, Kwehtl-ma-mish, and Stolutswhamish, living on the Snohomish and Stolutswhamish Rivers. The Snohomish tribe itself occupies only the country at its mouth and the lower end of Whidbey Island; the upper part of the river belonging to the Snokwalmu, &c. They number 441 souls, and the other bands, collectively, 556. At the time of the treaty they were all placed under Patkanam, the chief of the latter. It is observable that though the connection between them is most intimate, the Snohomish assimilate in dialect to the next tribe, the Skagit, while the Snokwalmu speak the Niskwalli in its purity. In the treaty of Point Elliott, the reservation for this division was fixed at two sections on a small creek emptying into the bay formed by the mouth of the Snohomish River. A central reservation of one township, to include the former, intended for the general agency of the Puget Sound district, and as an ultimate home for all the tribes, was contemplated at the same place. The small bay known as Tulalip Bay, upon which is a saw mill, affords an excellent site for this purpose; and the land in the neighborhood, being easily cleared and of good quality, would enable the Indians in a great measure to subsist themselves. The Snokwalmu and other upper bands of this division possess a

few horses, and are much intermarried with the Yakama Indians, here indiscriminately called Klikatat. They hunt as well as fish; their neighborhood to the mountains and more active and energetic character giving them a superiority in this respect. One of the two principal trails across the Cascade Mountains, that by way of the main Yakama, passes through their country; the Nahchess trail leading from White River.

4th. The Skagits, including the Kikiallu, Nukwatsamish, Tow-ah-ha, Smali-hu, Sakumehu, Miskaiwhu, Miseekwigweelis, Swinamish, and Skwonamish, occupy the remaining country between the Snohomish and Bellingham Bay, with the northern part of Whidbey Island and Perry Island. With them a different dialect prevails, though not so distinct but what they can be understood by those already mentioned. They altogether amount to 1,475, and have been assigned Goliah as head chief. This division have no horses, but are altogether canoe Indians. With the exception of the islands and the immediate shore of the main, their country is altogether unexplored. They formerly had some communication with the Indians beyond the mountains; but it is supposed to have been discontinued in consequences of obstructions to their trails. The Skagit reservation, as agreed upon in the treaty, was the peninsula forming the southeastern extremity of Perry Island.

5th. The Samish, Lummi, Nuksahk, living around Bellingham Bay and the Lummi River. The two former are salt water, the last exclusively river Indians, who as yet have had very little connection with the whites. Collectively,

> these might be called the Nuh-lum-mi. Tsow-its-hut was recognized as their common chief by the treaty, and a reservation made for them of an island at the forks of the river. Altogether they number 680. The languages of the Lummi, at the mouth of the river, and of the Nuk-sahk, a few miles higher up, differ so much as to be almost unintelligible to one another.

The chart accompanying his report (at p. 241), showing the relations of tribes mentioned in the report, was prepared by W. H. Dall, using Gibbs' data. The table graphically sets out the relations of the Duwamish river drainage groups as follows:

(Dwamish) { Sukwamish, Samamish
Skopamish, St'kamish, Sk'tehlmish

Either Dall or the printer who set type for the chart inadvertently omitted the Smulkamish, but it is patent that all these groups were being represented as Dwamish.

In addition to making the plan of tribal organization clear, the report is important because it contains Gibbs' explicit statement, recorded the year after the treaty, that the Skopamish, Stkamish, and Smulkamish were included in the Treaty of Point Elliott. If they had declined to sign, stayed away, or for any reason been omitted, it seems reasonable to suppose that Gibbs, as ethnologist and treaty secretary, would have noted it. He is careful to point out that although the Green River-White River groups are 'claimed by' the salt water Duwamish as part of their tribe, the connection is fictive. The report

makes it clear that the treaty arrangements as to tribal groupings and chiefs do not accurately reflect the realities of native political organization.